TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 68

R. H. DAVIS, TRADING AS DAVIS MOTOR SALES, PETITIONER,

vs.

AETNA ACCEPTANCE COMPANY.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

PETITION FOR CERTIORARI FILED MAY 26, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FEBRUARY TERM, A. D. 1933

ÆTNA ACCEPTANCE COMPANY, a Corporation, Defendant in Error,

vs.

R. H. DAVIS, Trading as DAVIS MOTOR SALES, Plaintiff in Error

Error to Circuit Court, Cook County

Honorable C. A. Hood, Judge Presiding

ABSTRACT OF RECORD

Placita.

Affidavit for replevin.

Replevin writ.

Order granting leave to plaintiff to withdraw replevin bond.

Declaration in replevin, consisting of three counts; count 1, for the unlawful taking of one Auburn Sport Sedan; and counts 2 and 3, for the unlawful detaining of said Auburn Sport Sedan.

Alias replevin writ.

Appearance of R. H. Davis, defendant.

Plea of the general issue, of the defendant.

Count in trover filed on December 24, 1929, alleging that the plaintiff was possessed of one Auburn Sport Sedan, of the value of $1,000; that it lost the same; that the defendant found it; that on request of the plaintiff the de-

[fol. 2] fendant refused to deliver the same to the plaintiff, but has wilfully, wrongfully, tortiously and maliciously converted the same; to the damage of the plaintiff in the sum of $1,000 and 5% interest thereon.

Order of December 24, 1929, granting leave to plaintiff to file additional counts to declaration instanter, and rule on defendant to plead in ten days.

Alias replevin bond.

Plea of the defendant of the general issue to the count in trover.

Special plea to the count in trover, setting forth, that after the happening of the grievances complained of in the declaration, on June 9, 1930, the District Court of the United States of America, for the Northern District of Illinois, entered an order setting forth, that whereas, Robert H. Davis, trading as Davis Motor Sales, was duly adjudicated a bankrupt under the Acts of Congress relating to bankruptcy, and that he complied with all the requirements of law relating thereto, that thereupon he was discharged from all debts and claims provable by said Acts against his estate, existing on the 13th of September, 1929, except such as were exempt from the operation of the discharge; that the above cause of action consisted of debts and claims provable against said estate under the Acts of Congress, and existed on the 13th of September, 1929, and that the supposed cause of action of the plaintiff is not exempt from the operation of said discharge.

June 17, 1930, order granting leave to defendant to file pleas instanter.

Replications of plaintiff to pleas of defendant, joining issue with the plea of the general issue of the defendant, and setting forth that the debt upon which the cause of action [fol. 3] of the plaintiff is predicated, is the wilful and malicious injury by the defendant to the property of the plaintiff, and created by fraud, misappropriation, embezzlement or defalcation of the defendant while acting in a fiduciary capacity; that the plaintiff on July 10, 1929 was the owner of an Auburn Sport Sedan, and on that day delivered it to the defendant under a series of documents known as a "floor plan" arrangement, providing that the title was retained in the plaintiff until the full sum of $1,181.87 should be paid by the defendant to the plaintiff; that the automobile should continue in the possession of the defendant until released from the floor plan arrangement, or removed by the plaintiff, and that said property should be returned to the plaintiff on demand; that the plaintiff should not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the property, except on written order from the plaintiff releasing the same upon payment to plaintiff of the amount stipulated in the agreement; that notwithstanding said written agreements, the defendant, without the knowledge or consent of the plaintiff, without obtaining any release, and without paying the above sum of money, and in violation of the defendant's duties as

bailee and trustee, some time subsequent to July 10, 1929 sold, disposed of, and converted the property to his own use, and the proceeds of the sale thereof, with the intent, and for the purpose of wilfully and maliciously injuring the plaintiff in said property and has failed to return said car notwithstanding repeated demands for said car have been made on the defendant by the plaintiff.

Order granting leave to plaintiff to file replication instanter.

[fol. 4] Order granting leave to Ramlose & Edwards to enter their appearance for defendant, in lieu of A. L. Schapiro.

Notice to place cause on trial calendar.

Amendment to count in trover filed October 8, 1931, by inserting $2,000 in lieu of $1,000 on the first page thereof as the value of the car also $2,500 in lieu of $1,000 on the second page thereof as the damages suffered, and increasing the *ad damnum* to $3,000.

Order that plaintiff be given leave to amend *ad damnum* and count in trover instanter, and rule on defendant to plead to count as amended within five days.

Order of November 14, 1931, dismissing suit as to John Doe, trial *ex parte* by court finding defendant guilty, and assessing plaintiff's damages at the sum of $1,441, judgment on the finding.

Order of November 18, 1931 vacating judgment entered on November 16, 1931, and cause reinstated on trial calendar.

Petition to vacate judgment entered November 16, 1931.

Appearance of Goldman, Allshouse & Healy as associate counsel for defendant.

Finding by court that the defendant, Robert H. Davis was guilty of legal conversion of the property as described in the count in trover.

Finding by Court that the defendant was not actuated by any wilful, malicious, or criminal intent in disposing of the car in question.

Trial by Court, finding the defendant guilty, and the right of possession to the property in the plaintiff, and [fol. 5] assessing the plaintiff's damages at the sum of $1,000.

Motion for new trial; motion overruled and exception by defendant.

Motion in arrest of judgment; motion overruled and exception by defendant.

Judgment that the plaintiff have and retain the property replevined by virtue of the writ of replevin herein, and also recover the sum of $1,000 for its damages and costs.

Appeal prayed by the defendant to the Appellate Court, First District of Illinois; appeal allowed; defendant granted sixty days to file bill of exceptions.

Motion to vacate judgment entered on May 12, 1932.

Motion to vacate judgment by the defendant overruled, to which defendant excepts. Time for filing appeal bond and bill of exceptions extended an additional thirty days.

Defendant's bill of exceptions presented for approval July 6, 1932.

Bill of exceptions.

Stipulation by the parties that the value of the car in question was $1,181.87; that the car was sold prior to the time that the defendant went into bankruptcy, which was about September 10, 1929, in the regular course of business, by a salesman of the defendant; that there was no concealment of the sale, and that the defendant was paid for the car.

[fol. 6] HARRY A. COLLINGER, witness for the plaintiff, testified as follows:

Direct examination:

My name is Harry A. Collinger. I live at 4564 Monticello avenue and an employed by the Ætna Acceptance Company; have been employed five and one-half years. I have general supervision of practically the whole business and am acquainted with the floor plan arrangement, whereby a dealer who has not enough money to pay for an automobile, advances ten per cent. The company advanced $1,181.87 on this car, and that was nienty per cent. $1,181.87 was turned over to the factory. The first papers were not paid and the defendant renewed notes. After the first transaction, where a check and certain papers passed, thirty days elapsed. At the end of thirty days the original note was paid by giving renewal papers therefor. This is defendant's signature to Plaintiff's Exhibit 1. It was executed on the date it bears. The amount of Plaintiff's Exhibit 1 has not been paid. I talked to Davis over the

telephone. One of our men had been to his store and came back with the report that this car was gone, so I immediately called Davis to find out what the situation was. I told him I had a report that the car was off the floor. He said he knew that but he would take care of the account within the next few days. I do not recall just how many conversations I had with Davis because I probably would call him four, five, six and eight times a week. All I would talk to Davis about would be about the account. The automobile has never been returned by Davis.

[fol. 7] The check and the contract have different dates because it was a renewal of the original instrument. The amount did not include finance charges. We are supposed to get one per cent per month. The original amount was $1,181.87, so at the end of the month we did not put in any interest in the new deal. When we advanced ninety per cent we did not figure in the interest. The interest item is paid ordinarily either at the end or the beginning of the period for which the note is taken. We advanced money to Davis on other deals before that time. We started to do business with Davis the early part of 1929. It may have been December, 1928, and continued until the date of this action. There must have been at least forty retail transactions with Davis. We had about twenty-eight wholesale transactions, more or less. This is a wholesale transaction involved here. All of the wholesale transactions were paid in the regular course of business. This deal was due and payable in sixty days. On the prior wholesale deals the release was the instrument, it was marked paid. I do not know, in these other wholesale transactions with Davis whether Davis would sell the car and then pay the bill. No formal, technical release was ever passed between the company and Davis in any of the transactions.

Redirect examination:

On the 10th day of August our company repossessed two automobiles. They are the other two of this deal. When I say paid I had in mind that we took the cars back.

[fol. 8] When we took the cars back I gave instructions to leave the instruments marked 1 and 2 for identification there. R. R. Wilson is the president of the company and Mr. Heater is the secretary. He still is secretary. Mr. McKernan went out there and took those papers. That is

McKernan's signature on Defendant's Exhibit 3 for identification. That was between the 5th and 10th of August, 1929. Davis went into bankruptcy about the 13th of September. On about August 14th we received the letter marked Defendant's Exhibit 4 for identification.

JOHN M. MCKERNAN, witness for the plaintiff, testified as follows:

Direct examination:

My name is John McKernan. I live at 5893 North Kilbourn avenue, Chicago. I know Mr. Davis, have known him three years. I solicited Davis' business for the Ætna Acceptance Company, handling the floor plan of checking cars. I called on Davis once a week for eight or nine months, from December, 1928 until August, 1929. At 600 West Madison street, Oak Park. I solicited his business on behalf of Ætna Acceptance Company, taking care of his wholesale, and checking it. I have seen Plaintiff's Exhibit 1 before. That is a floor plan. I saw the car described in this Exhibit 1. On Mr. Davis' show room floor. In June, 1929. I checked that car because we had a floor plan on it. I found that the numbers on it tallied with the wholesale mortgage. I checked it weekly. The last time I checked [fol. 9] it was around July 10th, 11th, 12th—it was the last time I saw the car. I went back every week end to check it. Next to the last time I checked it a week later. I found the car in his showroom. Around July 25th was the last time I saw it. I went back on my tour of inspection. The car was not there. I spoke to Davis about it. He said he had sold the car, or it was out on approval, he would send a check as soon as he got around to it. I reported it. I had no other conversation with Davis. I have not seen the car from that day to this. I reported it to Collinger.

Cross-examination:

The last time was the 25th of July, 1929. I said I would like to get it cleaned up or a check as quick as possible. I asked for the money. The balance in full. I did not call after July 25th about the car. After the 25th I called on Davis, about the 7th or 8th of August. That is when I discovered the car was gone. I was not the man who took the

other cars on the 10th of August. That is my signature on Defendant's Exhibit 3 for identification. I gave Mr. Davis that instrument.

Plaintiff's Exhibits 1 and 2 offered and received in evidence, which are as follows:

Plaintiff's Exhibit 1 is a chattel mortgage executed by Davis Motor Sales to Ætna Acceptance Company, covering an Auburn sport sedan, serial number 2976808, motor number 25943, to secure the payment of $1,181.87, dated July 10, 1929. Attached to the mortgage is a note of even date for $1,181.87, payable to the order of Ætna Acceptance Company sixty days after date. Also attached is a trust receipt of even date signed by Davis Motor Sales acknowledging receipt of the above automobile and agreeing [fol. 10] to hold the above property as the property of the Ætna Acceptance Company for the purpose of storing the same, and agreeing to keep the property new and not to operate for demonstration or otherwise, and to return the property to the Ætna Acceptance Company on demand; agreeing also not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of said property to any other person, except upon written order from said company for release from trust upon payment to the company of amount required by the order, upon the endorsement on the back of this trust receipt of a release from trust. Attached to the above is a bill of sale dated July 19, 1929, executed by Davis Motor Sales to Ætna Acceptance Company, conveying automobile in question.

Plaintiff's Exhibit 2 is a check dated June 10, 1929, executed by Ætna Acceptance Company, made payable to the order of Davis Motor Sales for $1,181.87, drawn on the Fidelity Trust and Savings Bank.

Thereupon the plaintiff rested.

R. H. Davis, witness for the defendant, testified as follows:

Direct examination:

My name is R. H. Davis. I live at 603 Wesley avenue, Oak Park. In 1929 I was in the automobile business. I was in that business two or three years, selling cars at retail to the public. I had a sales room floor and retailed them in

the ordinary course of business. I had business transactions with the Ætna Acceptance Company, the plaintiff. They began in 1928 and ceased September 3, 1929. I had [fol. 11] wholesale transactions. They financed cars on my sales room floor. I sold them at retail on conditional sales contract. I financed approximately 28 to 35 wholesale cars through the Ætna Acceptance Company. I never got a written release of these cars from the Ætna Acceptance Company. I had about fifty retail transactions. When McKernan came to solicit my business there was something said at that time about rebates on deals. That was about November 28, 1928. My bookkeeper was present when McKernan came in. His name is Mr. Sheid. He said that on every used car deal I turned into the Ætna Acceptance Company I would receive $6.00. On every new car deal I turned in I would receive $12. McKernan said that that was a rebate. I sold the car in question on August 3, 1929 through my salesman, Panter. It was on my books and the salesman's commission was paid. It was sold in the regular course of business. There was no concealment about it. After the car was sold I had a conversation with Mr. Heater of the Ætna Acceptance Company. He was secretary of the company. The conversation was with respect to this car. The afternoon when I sold this car I called Mr. Heater and told him I had sold the automobile and that I would like a statement from him as to the money due on a judgment they were getting on a Goodyear deal which amounted to $382, and rebate money on previous deals, and unless they would furnish me with a statement I was going to floor-plan my cars through another finance company. He said he would do it and it would not be necessary to floor-plan them through any other house, but I never received any statement. I had no other conversation with Heater on the night of August 10th. I was out of my place of business on August 10th. Before I left the place [fol. 12] the two Auburn automobiles financed by the Ætna Acceptance Company were there. When I returned they were not there. I found these papers there and I had a talk with Heater about the papers and the automobile. I refer to Defendant's Exhibits 1 and 2 when I talk about these papers. I told Heater that they had taken the two cars off my floor and I would like a statement in full for the money due on the other two transactions, such as rebate money and the money due me on the Goodyear deal and

also ten per cent on the two cars they had taken off the floor, and if they would give me a statement I would give them a check in turn for what I owed them. McKernan's signature appears on Defendant's Exhibit 3. The Goodyear judgment is the one referred to in Defendant's Exhibit 3. I never received any money on that judgment. Heater told me that I should call or go down and see Mr. Kleinman on the 10th of August. The same day I found these papers. I was told to see Mr. Kleinman and I would get the money on this particular judgment. Kleinman referred me to Heater and it seemed I could not get any money from either of them. On July 8, 1929 I saw McKernan. He left this document with me. On July 10th I told the secretary that they owed me money. I told him they owed me $161 in rebate money, $352, the ten per cent in the car, and $382 on the judgment. He said we could get together on it. I told him I would tender him the balance. I did not tender the balance and I never received a statement from them. I did not know what was coming to me for the simple reason I was to receive half the judgment they were collecting from Goodyear. I knew two of the items. When McKernan left the paper he said $498 was half the judgment. The real amount of the judgment [fol. 13] was over $700. I told him (the secretary) the correct amount of my half was 300 some odd dollars. I did not tell the secretary over the telephone I had 300 some odd dollars coming on the judgment. On the 10th I was down to their office. Defendant's Exhibit 4 is in my handwriting. (Mr. Kleinman admits having received it.) I never received any money at all. I was down to Kleinman to see about the Goodyear judgment prior to this deal. Kleinman referred me to Heater. Heater referred me to Kleinman. I first talked to Kleinman about June 8th. Goodyear judgment was one of the deals that was financed by the Ætna Acceptance Company. It was a retail deal with recourse. I accepted the deal and Mr. Goodyear needed a signature on it and his mother and sister signed the deal. Several months later he fell down on the payments and left the car out and reported it stolen. Nevertheless, the deal fell back and there was a judgment entered against Mr. Goodyear. In the meantime I paid it. I think I was entitled to the whole judgment but I was told I was to receive half. There is money coming to me for at least half of the judgment, that is $382 and $200 for rebate. All

these things happened before I went into bankruptcy. I reported these matters to my attorney when I filed my petition in bankruptcy. The items were scheduled there but the amounts I do not remember. I never got this. The bankrupt court never got them, nor the trustee, nor receiver acting for me.

Agreement by the parties that no formal releases were ever given in any prior transaction. Statement by Mr. Healy on question of the Court.

These two items of assets were scheduled by deducting what the Ætna Company owed Davis from what Davis [fol. 14] owed the company, which left a balance of about $50 owing from Davis to the Ætna Company.

Thereupon the defendant offered bankruptcy schedules A and B, which were received in evidence marked Defendant's Exhibit 5, which is in words and figures as follows:

Defendant's Exhibit 5 consists of Schedules A-3 and A-4. A-3 sets forth the Ætna Acceptance Company as a creditor for merchandise to the extent of $50. Schedule A-4 shows liability of Davis to the Ætna Acceptance Company as endorser on four notes for the amounts as follows: $253.80, $1,392, $298.20 and $343.20.

Defendant's Exhibits 1, 2, 3, 4, 6 and 7, offered and received in evidence, are as follows:

Defendant's Exhibit 1 is a notice dated August 10, 1929, certifying that the American Foreclosure Company was authorized by Ætna Acceptance Company to take possession of an Auburn 120 cabriolet, serial number 25713, motor 2953713, covered by chattel mortgage or conditional sales contract by reason of default under the mortgage or contract. Signed American Foreclosure Company, by G. Patch. Also receipt for the above car in good order the 10th day of August, 1929, signed G. A. Patch.

Defendant's Exhibit 2 is a notice dated August 10, 1929, certifying that the American Foreclosure Company was authorized by Ætna Acceptance Company to take possession of an Auburn 8-90 Sedan, serial number 2974243, motor number 21892.

Defendant's Exhibit 3 is a letter written by Ætna Acceptance Company by J. McKernan to R. H. Davis Motor [fol. 15] Sales on June 8, 1929, advising that judgment had been taken against Goodyear in the amount of $498.40; that the property was up for sale; also that Goodyear's attorney was talking settlement; and that when settlement

was made Davis would receive one-half of the amount collected. Attached to the letter is a Statement of Sale of the Goodyear car, showing the total indebtedness to be $698.40 and a credit on account of the car sold for $200, leaving a deficiency of $498.40.

Defendant's Exhibit 4 is a letter written by Davis Motor Sales to the Ætna Acceptance Company on August 14, 1929, stating that in his absence two cars were removed from his floor and that it was entirely uncalled for, as it was his understanding that the cars were to be sold and checks forwarded for the amounts due; that he had decided that he did not care to have further dealings with the Company and requested an itemized statement of the moneys claimed to be due by the Ætna Acceptance Company, and that he would submit the same to his attorneys, together with an itemized statement of the amount he claimed the Ætna Company owed him, with instructions to his attorney to send to the Ætna Company a check for the moneys owing to that Company and a demand for a check in the event the Ætna Company was indebted to him, also requesting an itemized statement of the moneys claimed by the Company, including credits due him on reserves and other deals.

Defendant's Exhibit 6 is a certified copy of an order entered on June 9, 1932, by Charles E. Woodward, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, in suit 42709, dis- [fol. 16] charging Robert H. Davis, Trading as Davis Motor Sales, from all debts provable by the Acts of Congress relating to bankruptcy which existed on the 13th day of September, 1929, except such debts — are by law exempted.

Defendant's Exhibit 7 is a certified copy of the judgment entered in the suit of Ætna Acceptance Company *vs.* G. J. Goodyear, *et al.*, in the Municipal Court of Chicago, suit number 1880009, for the amount of $768.40; also a satisfaction of judgment in said suit for the above amount of money executed by William S. Kleinman, attorney for Ætna Acceptance Company.

Defendant's Exhibits 8 and 9 offered and received in evidence are as follows:

Defendant's Exhibit 8 is a conditional sales contract executed by Lucy E. Wilson as purchaser and Davis Motor Sales as sellers of an Auburn sedan, motor number 258587, serial number 2951032, for which car the purchaser agreed

to pay the sum of $1,162.56. Attached to the contract is a note executed by Lucy E. Wilson for the above amount of money dated of even date with the contract, made payable to Davis Motor Sales at the office of the Ætna Acceptance Company and endorsed without recourse to the Ætna Acceptance Company, which contract and note are stamped paid February, 1930.

Defendant's Exhibit 9 is a chattel mortgage executed by Davis Motor Sales as mortgagor on February 13, 1929, whereby it mortgaged to the Ætna Acceptance Company an Auburn sedan, serial number 2951032, motor number 25857, in consideration of $1,458.90, advanced by the latter company. Attached also is a Bill of Sale executed by Davis [fol. 17] Motor Sales to Ætna Acceptance Company on the same car and also dated February 13, 1929. There is also attached a trust receipt of even date, executed by Davis Motor Sales, acknowledging receipt of the above car from the Ætna Acceptance Company and agreeing to hold the same in trust for the Company and not to sell, loan, rent, deliver, mortgage, pledge, or otherwise dispose of the property to any other person except upon written order from the Ætna Acceptance Company for release from trust, upon payment to the Company of the amount required by said order, and upon the endorsement on the back of the trust receipt of a release. There is also attached a note executed by Davis Motor Sales of even date for $1,458.90, made payable to the order of Ætna Acceptance Company thirty days after date. All of these instruments are stamped paid March 12, 1929.

The Witness: I kept a record of these rebates and figured the amount from the record. I tried to get the books from the receiver in bankruptcy and he said that they had been destroyed. While the books were in my possession and negotiations were going on, my bookkeeper made a record of the rebates and took a list off the books, which is marked Defendant's Exhibit 10 (for identification). It is in my bookkeeper's handwriting. I remember the deals. I remember Gust Olson deal. I recall these deals entitled to rebate. I collected rebates on previous deals. These rebates were about a month old at the time I demanded them. I had been in the general habit of collecting rebates on all prior deals except those of that month. The rebates ran from $100 to $250 a month.

Defendant's Exhibit 10 for identification offered and received in evidence, which is a statement on the letterhead [fol. 18] of Davis Motor Sales, dated January 28, 1932, showing items as follows:

June 1	J. L. Wellenhofer	$ 29.00
June 8	Geo. A. Alm	27.00
June 14	H. S. Fomey	6.00
June 7	J. K. McDonald	12.00
June 22	C. Witting	6.00
June 24	W. Green	6.00
June 24	A. J. Flashing	12.00
June 22	R. W. Maguire	24.00
June 29	F. H. Ducil	12.00
July 19	P. C. Weeg	27.00
		$161.00
June and July		291.10
127.10		$452.10
164.00, Mr. Goodyear		498.40
291.10		$950.50

Cross-examination.

We kept a complete set of books in our business showing the type of cars sold, who sold them, dates of sale, the price, profit, and the purchase price, also the finance company. Most of the cars were sold on time deals. I kept a complete bookkeeping system and reported every transaction I had with the Ætna Company and by simple computation I could have figured the amounts of the rebates to which I was entitled at any given date.

Defendant's Exhibits 11 to 16 inclusive were received in evidence and are as follows:

Defendant's Exhibit 11 consists of the following documents:

A chattel mortgage executed by the Ætna Motor Sales to Ætna Acceptance Company on March 20, 1929, covering [fol. 19] an Auburn phaeton sedan, serial number 2972160, motor number 19631, securing the payment of $1,400. A chattel mortgage note of even date executed by Davis Motor Sales for $1,400, made payable to the order of the Ætna Acceptance Company. A bill of sale executed by

Davis Motor Sales to Ætna Acceptance Company to the above car, dated March 20, 1929. A trust receipt executed by Davis Motor Sales on March 20, 1929, acknowledging receipt of the above car from the Ætna Acceptance Company and agreeing to hold the same in trust for the Company and agreeing not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the property except upon the written order of the Ætna Acceptance Company for release from said trust, upon payment to the above Company of the sum of $1,400.

Defendant's Exhibit 12 consists of a chattel mortgage of the Davis Motor Sales on March 18, 1929, to the Ætna Acceptance Company covering an Auburn 1929 sedan, serial number 2951504, motor number 26053, to secure the payment of $1,471.50. Attached to the mortgage is a mortgage note of even date executed by the Davis Motor Sales evidencing the indebtedness of $1,471.50 due under the above mortgage. Attached is also a Bill of Sale of the Davis Motor Sales, executed on the 18th of March, 1929, to the Ætna Acceptance Company covering the above car. Attached also is a trust receipt of even date with the above instruments, executed by Davis Motor Sales, in which it acknowledges receipt of the above sedan from the Ætna Acceptance Company, agrees to hold the same in trust for the latter Company and not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of said property [fol. 20] except upon the written order of the Ætna Acceptance Company for release from trust, upon payment of the above amount.

Defendant's Exhibit 13 is comprised of a chattel mortgage of Davis Motor Sales to the Ætna Acceptance Company covering the Auburn Victoria coupe, serial number 2971224, to secure an indebtedness of $1,131.30. Attached to it is a chattel mortgage note for the above amount executed by the Davis Motor Sales on the same day. Attached is also a Bill of Sale of the Davis Motor Sales selling the above car to the Ætna Acceptance Company. Attached is also a trust receipt of the Davis Motor Sales, dated March 26, 1929, acknowledging receipt of the above automobile from the Ætna Acceptance Company, and agreeing to hold the same in trust, and agreeing not to sell, loan, rent, encumber or dispose of the same except upon written order from the Ætna Acceptance Company and upon payment of the above amount.

Defendant's Exhibit 14 is a chattel mortgage of Davis Motor Sales dated April 13, 1929, to the Ætna Acceptance Company, covering an Auburn sedan, serial number 2951154, motor number 26143, securing the payment of the sum of $1,471.50. Attached thereto is also a chattel mortgage note for $1,471.50 of the Davis Motor Sales of even date with the chattel mortgage, made payable to the order of the Ætna Acceptance Company. Attached thereto is a Bill of Sale of Davis Motor Sales covering the above car, by which the Davis Motor Sales Company sells the same to the Ætna Acceptance Company. Attached thereto is also a trust receipt executed by the Davis Motor Sales on April 13, 1929, by which it acknowledges receipt of the above car from the Ætna Acceptance Company, agreeing [fol. 21] to hold the same in trust and not to sell, loan, rent, encumber, or dispose of the same except upon the written order of Ætna Acceptance Company and upon payment of the above amount of money and release of said property from said trust.

Defendant's Exhibit 15 is a chattel mortgage executed by the Davis Motor Sales on the 18th day of May, 1929 to the Ætna Acceptance Company covering an Auburn sport sedan, serial number 2975904, motor number 24722, securing the payment of $1,181.47. Attached thereto is a chattel mortgage note of the Davis Motor Sales evidencing the above amount. Attached thereto is a Bill of Sale of even date of the Davis Motor Sales to the Ætna Acceptance Company, whereby the above automobile was sold to the latter Company. Attached thereto is also a trust receipt of even date with the above instruments, in which the Davis Motor Sales acknowledges receipt of the above car and agrees to hold the same in trust for the Ætna Acceptance Company and not to sell, loan, encumber or otherwise dispose of the same except upon the written order of Ætna Acceptance Company to release the same from trust, and upon payment of the above amount.

Defendant's Exhibit 16 consists of a chattel mortgage of the Davis Motor Sales dated May 18, 1929, to the Ætna Acceptance Company, covering an Auburn sedan, wire wheels, serial number 2985549, motor number 11046, securing the payment of $946.35. Attached thereto is the chattel mortgage note of Davis Motor Sales, made payable to the Ætna Acceptance Company, evidencing the above amount. Attached thereto is also a Bill of Sale of the

Davis Motor Sales dated May 18, 1929, selling to the Ætna Acceptance Company the above automobile.

[fol. 22] Also, is attached a trust receipt of Davis Motor Sales acknowledging receipt of the above automobile from the Ætna Acceptance Company and agreeing to hold the same in trust and not to sell, loan, rent, deliver, encumber or dispose of the same except upon the written order of Ætna Acceptance Company to release the same from trust, and upon payment of the above amount.

Defendant's Exhibits 17, 18 and 19 were offered and received in evidence and are as follows:

Exhibit 17 is a certified copy of an order entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the bankruptcy proceedings of Robert H. Davis, to the effect that on December 27, 1929, on notice duly filed and motion of bankrupt, an order was entered restraining Ætna Acceptance Company from prosecuting cause number B-188574 in the Circuit Court of Cook County until the further order of this Court.

Defendant's Exhibit 18 is a certified copy of an answer filed December 27, 1929, by the Ætna Acceptance Company to the petition of Robert H. Davis in the above bankruptcy proceedings, setting forth that on September 25, 1929, Ætna Acceptance Company commenced an action of replevin in the Circuit Court of Cook County against the bankrupt in suit B-188574; that demand was made on the bankrupt for the return of the property mentioned in the replevin writ; the demand was refused and thereafter the bankrupt caused his appearance and plea to be filed in said cause, whereupon a count in trover was filed by the plaintiff and rule entered on the defendant to plead; that the proceedings was for the recovery of an Auburn sedan, serial number 2976808, motor number 25943, which was entrusted to the defendant as trustee for the Ætna Acceptance Company without right ofdisposition, and that the bankrupt had [fol. 23] no interest in or title to the property except through the Ætna Acceptance Company; that the bankrupt bore a confidential relationship toward the Ætna Acceptance Company with respect to the automobile; yet the bankrupt, subsequent to the receipt of the automobile, as such trustee fraudulently embezzled and misappropriated the automobile to his own use, with the intent to deprive the Ætna Acceptance Company of it, to its damage in excess of $1,000; that the bankrupt wilfully and maliciously intended

to injure the Ætna Acceptance Company and that the obligation of the bankrupt for the automobile is not dischargeable by the bankrupt laws, and that an adjudication in the above suit in the Circuit Court could not be effected by discharge in bankruptcy, by virtue of which the Ætna Acceptance Company moved the Court to deny the bankrupt's petition for exemption. The above answer was filed December 27, 1929.

Defendant's Exhibit 19 is a certified copy of the petition filed by Robert H. Davis in the above bankruptcy proceedings on December 27, 1929, praying that the Ætna Acceptance Company be restrained from proceeding with Case B-188574 pending in the Circuit Court of Cook County, entitled Ætna Acceptance Company vs. R. H. Davis, trading as Davis Motor Sales.

Robert H. Davis, witness for the plaintiff, further testified:

Redirect examination:

Defendant's Exhibit 11 represents a transaction similar to the one in question. Those papers were signed when the car described in the exhibit was purchased by me and financed by the Ætna Acceptance Company. That is my signature to the instrument. I received that back after [fol. 24] the car had been sold, and had been paid for. When I signed the exhibit it was turned over to the Ætna Acceptance Company and I received the car from the distributor. After I paid for the transaction I received the exhibit back.

Stipulation by the attorneys that the defendant would testify similarly to Exhibits 12, 13, 14, 15 and 16.

Thereupon the defendant rested his case.

The plaintiff thereupon offered Schedule B-3 consisting of two pages and B-4 consisting of one page of the bankrupt matter of Robert H. Davis, which were received in evidence as Plaintiff's Exhibits 1 and 2, of January 31, 1932. Plaintiff's Exhibits 1 and 2 consist of a certified copy of Schedules B-3 and B-4 filed October 29, 1929, in bankruptcy number 42709 of Robert H. Davis, bankrupt which is a list of debtors. Ætna Acceptance Company does not appear in the list.

The foregoing was all of the testimony and evidence offered and received.

Thereupon the defendant presented to the Court a finding of fact to be held by the Court as a finding of fact in said cause, which Court then and there marked "Hold as a Finding of Fact in said Cause," and is in words and figures as follows:

"The Court finds that the defendant was not actuated by any wilful, malicious or criminal intent in disposing of the car in question."

Thereupon the plaintiff submitted to the Court a finding, which was also held as a finding in said cause, which is in words and figures as follows:

"The Court finds Robert H. Davis guilty of legal conversion of the property of the plaintiff as described in the court in trover heretofore filed herein."

[fol. 25] The Court: The Court finds that the defendant in this case was not actuated by any wilful, malicious or criminal intent in disposing of the car in question.

The Court: I will find the defendant guilty of conversion.

The Court thereupon found the defendant guilty and assessed the plaintiff damages in the amount of $1,000, to which finding the defendant, by his attorneys, then and there duly excepted.

Thereupon the Court entered a judgment on said finding in trover against the defendant and assessed the plaintiff damages in the sum of $1,000 and costs of suit, to the entry of which judgment the defendant, by his attorneys, then and there duly excepted.

Thereupon the defendant, by his attorney, prayed an appeal to the Appellate Court, First District of Illinois, which was allowed upon the defendant filing a bond of $1,300 within thirty days from May 12, 1932, and the defendant was granted sixty days from such date within which to file a Bill of Exceptions.

Thereupon the defendant moved the Court to vacate the judgment, because it was contrary to the finding of the Court, which motion the Court denied, to which ruling — the Court, the defendant, by his attorney, then and there duly excepted.

Thereupon the time for filing the defendant's Bill of Exceptions was extended thirty days beyond the time theretofore set for the filing of same.

Certificate of the Judge that the Bill of Exception was presented for signature on the sixth day of July, 1932.

Stipulation that original bill of exceptions may be inserted in the certified copy of the record to be filed in the Appellate Court, in lieu of a copy.

[fol. 26] Order that the bill of exceptions of the defendant be approved nunc pro tunc as of June 6, 1932, and ordered filed as of said date.

Certificate of clerk.

Assignment of Errors

Now comes R. H. Davis, doing business as Davis Motor Sales, plaintiff in error in the above entitled cause, and alleges that there is error in the records and proceedings in the above entitled cause in that:

1. The finding of the Court is contrary to the evidence.

2. The finding of the Court is contrary to the law.

3. The judgment of the Court is contrary to the evidence.

4. The judgment of the Court is contrary to the law.

5. The finding of the Court is contrary to the special finding of the Court, that the plaintiff in error was not actuated by any malicious, wilful or criminal intent in disposing of the car in question.

6. The judgment of the Court is contrary to the special finding of the Court, that the plaintiff in error was not guilty of any malicious, wilful or criminal intent in disposing of the car in question.

7. The general finding of the Court is contrary to the special finding of the Court, that the plaintiff in error was not actuated by any wilful, malicious or criminal intent in disposing of the car in question.

[fols. 27–29] 8. The trial court erred in refusing to recognize the injunctional order of the District Court of the United States, for the Northern District of Illinois, restraining the defendant in error from prosecuting this suit.

Wherefore, the plaintiff in error prays that said judgment be reversed.

Goldman, Allshouse & Healy, Ramlose & Edwards,
Attorneys for Plaintiff in Error.

[fol. 30] In Appellate Court of Illinois, First District, February Term, A. D. 1933

No. 36473

Ætna Acceptance Company, a Corporation, (Plaintiff) Defendant in Error,

vs.

R. H. Davis, Trading as Davis Motor Sales, (Defendant) Plaintiff in Error

Error to Circuit Court, Cook County

Honorable C. A. Hood, Judge Presiding

Additional Abstract of Record

Stipulation of the parties by their respective attorneys that the sum of $1,181.87 is the value of the automobile in question, that the defendant disposed of the automobile prior to the time he went into bankruptcy; that the car was sold about August 3, 1929, in the regular course of business and that the consideration for the sale of said automobile was received by Mr. Davis, the defendant herein.

The Court: • • • I will find the defendant guilty of conversion. Finding of guilty and plaintiff's damages in the amount of $1,000.

[fol. 31] Mr. Kleinman: I object to the finding as to value in view of the previous stipulation of a value of $1,181.87.

The Court: Objection overruled.

Mr. Kleinman: Exception.

Transcript of record showing the correct judgment order entered in this cause in the Circuit Court of Cook County, and filed in this court on February 17, 1933, by leave of court:

Placita.

Order entered January 14, 1933, nunc pro tunc as of May 12, 1932, showing cause submitted to the court for trial. Court heard all the evidence adduced and being fully advised in the premises finds the defendant guilty of converting the property of the plaintiff as charged in plaintiff's court in trover heretofore filed herein and assesses the plaintiff's damages at the sum of one thousand dollars ($1,000).

Motion of defendant for a new trial overruled, and exception.

Motion of defendant in arrest of judgment overruled, and exception.

Judgment on finding that the plaintiff do have and recover of and from the defendant, R. H. Davis, its damages of one thousand dollars ($1,000) in form as aforesaid by the court assessed, together with its costs and charges in this behalf expended and have execution therefor.

[fol. 32] Prayer for appeal by the defendant which is allowed upon filing his appeal bond in the penal sum of thirteen hundred dollars ($1300) to be approved by the clerk of this court within thirty (30) days; bill of exceptions within sixty (60) days.

Ordered that the above order and judgment be and the same is hereby entered herein of record nunc pro tunc as of May 12, A. D. 1932.

Exception by defendant to entry of above judgment order; ten (10) days allowed for bill of exceptions.

Certificate of clerk of the Circuit Court of Cook County.

Assignment of Cross-errors of Defendant in Error

Now comes Ætna Acceptance Company, a corporation, defendant in error, by William S. Kleinman, its attorney, and assigns cross-errors, and says that the trial court committed manifest error, as appears from the record, in this:

1. The court erred in making the finding of fact as requested by the defendant.

2. The finding of fact held by the court at the request of the defendant is contrary to the evidence and should have been refused.

3. The finding of fact made by the court at the request of the defendant is contrary to and inconsistent with the finding of fact made by the court at the request of the plaintiff.

[fols. 33 & 34] 4. The findings of facts being inconsistent to each other should be stricken and entirely disregarded.

5. The court erred in admitting into the record evidence offered on behalf of the defendant, to which repeated objections were made, but which the court received subject to objections and did not thereafter rule upon such objections. Such evidence as was objected to should now be ruled upon and stricken from the record.

6. The court erred in entering judgment for only $1,000, when it was stipulated between the parties that the value of the automobile in question is $1,181.87. The judgment should have been for $1,181.87, together with legal interest thereon at 5 per cent per annum, from August 3, 1929, which is the date of the conversion, to the date of the entry of judgment.

By reason whereof, defendant in error prays that said errors may be corrected, etc.

William S. Kleinman, Attorney for (Plaintiff) Defendant in Error.

[fols. 35 & 36] [Caption omitted]

[fols. 37 & 38] In Appellate Court of Illinois

Præcipe—Filed Dec. 6, 1932, to the February Term, A. D. 1933

State of Illinois,
Appellate Court, First District, ss:

Gen. No. 36473

Ætna Acceptance Company, a Corporation (Plaintiff), Defendant in Error,

vs.

R. H. Davis, Doing Business as Davis Motor Sales, (Defendant) Plaintiff in Error

Error to the Circuit Court of Cook County

Nisi Prius Gen. No. B. 188574.
Nisi Prius Judge: Craig Hood.

The Clerk will please issue a Writ of Error in the above entitled cause, directed to the Clerk of the Circuit Court

of Cook County. Also, issue a Writ of Scire Facias to the Sheriff of Cook County, commanding him to summon the said Defendant in Error, as provided by law.

This was an action of replevin in the Circuit Court of Cook County, Illinois, wherein judgment was rendered on the 12th day of May, A. D. 1932, and at the April Term of said Circuit Court, on the law side thereof in favor of Ætna Acceptance Company, a Corporation, and against R. G. Davis, doing business as Davis Motor Sales, for One Thousand Dollars, besides costs of suit.

Goldman, Allshouse & Healy, Ramlose & Edwards,
Attorneys for R. H. Davis, Doing Business as
Davis Motor Sales, Plaintiff in Error.

To Sheldon W. Govier, Clerk of the Appellate Court, First District, Illinois.

[fols. 39 & 40] In Appellate Court of Illinois

State of Illinois,
Appellate Court of the First District, ss:

The People of the State of Illinois to the Clerk of the Circuit Court for the County of Cook, Greeting:

Writ of Error—Filed Dec. 6, 1932

Because, in the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of —— County, before the Judge thereof, between Ætna Acceptance Company, a Corporation, plaintiff, and R. H. Davis, doing business as Davis Motor Sales, defendant, it is said manifest Error hath intervened, to the injury of the aforesaid R. H. Davis, doing business as Davis Motor Sales as we are informed by his complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Appellate Court the Records and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Chicago, in the County of Cook, on or before twenty days before the first

Tuesday of February, 1933 next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the Error, what of right ought to be done according to law.

Witness, the Hon. William H. McSurely, Presiding Justice of our Court and the seal thereof, at Chicago, this 6th day of December in the year of our Lord one thousand nine hundred and Thirty-two.

Sheldon W. Govier, Clerk of the Appellate Court of the First District. (Seal.)

[fols. 41 & 42] In Appellate Court of Illinois

State of Illinois,
Appellate Court, First District, ss:

Writ of Scire Facias—Dec. 6, 1932

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea which was in the Circuit Court of Cook County before the judge thereof, between Ætna Acceptance Company, a Corporation, plaintiff, and R. H. Davis, doing business as Davis Motor Sales, defendant, it is said manifest Error hath intervened, to the injury of the said R. H. Davis, doing business as Davis Motor Sales as we are informed by his complaint, the record and proceedings of which said judgment we have ordered to be brought into our Appellate Court of the First District, State of Illinois, at Chicago, before the Justices thereof, to correct the errors in the same in due form and manner, according to law.

Therefore, we command you, That by good and lawful men of your county, you give notice to the said Ætna Acceptance Company, a Corporation, that it be and appear before the Justices of our said Appellate Court, at the next term of said Court, to be holden at Chicago, in said State, on the first Tuesday in February A. D. 1933, to hear the record and proceedings aforesaid, and the errors assigned if it shall see fit, and further to do and receive what said Court shall order in this behalf, and have you then and

there the names of those by whom you shall give the said Ætna Acceptance Company, a Corporation, notice, together with this writ.

Witness, Hon. William H. McSurely, Presiding Justice of our Court and the seal thereof, at Chicago, this 6th day of December in the year of our Lord one thousand nine hundred and Thirty-two.

Sheldon W. Govier, Clerk of the Appellate Court of the First District, Illinois. (Seal.)

[Endorsed:] Pd. 2.50. M .60. State of Illinois, Cook County, ss. Served this writ on the within named Ætna Acceptance Company, a Corporation by delivering a copy thereof to H. A. Callings, Manager & Agent of said Corporation this 16th day of December 1932. The President of said Corporation not found in my County. William D. Meyering, Sheriff, by James H. Frawley, Deputy.

[fol. 43] IN APPELLATE COURT OF ILLINOIS

ORDER ASSIGNING CAUSE—Dec. 6, 1932

On the Court's own motion it is ordered that the following numbered cases on the December Term Calendar, A. D. 1932 of said Court be and the same are hereby assigned to the Third Division Appellate Court for hearing and determination, to-wit: 36473: Ætna Acceptance Co., a Corp., vs. R. H. Davis etc. et al.

[fol. 44] IN APPELLATE COURT OF ILLINOIS

No. 36473

ÆTNA ACCEPTANCE COMPANY, a Corporation, Defendant in Error,

vs.

R. H. DAVIS, etc., Plaintiff in Error

Error to Cook Circuit

ORDER MAKING WRIT OF ERROR A SUPERSEDEAS—Dec. 9, 1932

This day came Plaintiff in Error by Goldman, Allshouse & Healy, his Counsel, and moved the Court to make the

writ of error issued in the above entitled cause a supersedeas; and the Court, having examined the Record, Abstracts and Briefs filed herein, and being now fully advised in the premises, doth order that upon the said Plaintiff in Error entering into a Supersedeas Bond, conditioned according to law, in the penal sum of Fifteen Hundred Dollars, with Grace Davis and Robert R. Davis as sureties thereto, said Writ of Error be made a supersedeas; whereupon counsel for said Plaintiff in Error presented his certain Supersedeas Bond in compliance with order aforesaid, it is therefore ordered by the Court that the writ of error issued herein be and the same is hereby made a supersedeas, and as such is to be obeyed by all concerned.

[fols. 45 & 46] In Appellate Court of Illinois, First District

[Title omitted]

Appearance of Defendant—Filed Jan. 6, 1933

I hereby enter the appearance of Ætna Acceptance Company, a Corporation, Defendant in error, and myself as its attorney herein.

William S. Kleinman, Attorney for Ætna Acceptance Company, a Corporation, Defendant in Error.

Dated this 6th day of January A. D. 1932.

[fol. 47] In Appellate Court of Illinois

[Title omitted]

Order Denying Motion to Dismiss—Feb. 10, 1933

The Court having considered the motion of Defendant in Error to strike the complete transcript of record heretofore filed herein in said cause by Plaintiff in Error from the files of this Court and to dismiss the Writ of Error issued herein in said cause as per suggestions and affidavit filed herein, and having also considered the counter-suggestions of the Plaintiff in Error to said motion, and being

now fully advised in the premises doth order that said motion be and the same is hereby denied.

[fol. 48] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION SUGGESTING A DIMINUTION OF RECORD, ETC.—Feb. 17, 1933

The Court having considered the motion of Defendant in error suggesting a dimunition of the Transcript of Record heretofore filed herein in said cause and for leave to file a Supplemental Record herein instanter as per suggestions filed herein. And being now fully advised in the premises doth order that said motion be and the same is hereby allowed.

The Court having also considered the motion of Defendant in error to extend the time 90 days from February 17th, A. D. 1933 in which to file an Assignment of Cross Errors, Briefs and additional abstracts in said cause as per suggestions filed herein. And being now fully advised in the premises doth order that said time be and the same is hereby extended 60 days from February 17th, A. D. 1933.

[fol. 49] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER OF SUBMISSION—March 15, 1933

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being fully advised in the premises, doth order that said cause be taken under advisement on abstracts and briefs filed by Plaintiff in error and assignment of cross errors, brief and additional abstract of Defendant in error to be filed by April 18, 1933.

[fol. 50] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION FOR LEAVE TO FILE AN ASSIGNMENT OF CROSS-ERRORS, ETC.—April 21, 1933

The Court having considered the motion of Defendant in error for leave to file an Assignment of cross Errors, briefs and additional abstracts in said cause 15 days from April 18th, A. D. 1933 as per suggestions and affidavit filed herein. And being now fully advised in the premises doth order that said motion be and the same is hereby allowed.

[fol. 51] IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 36473

ÆTNA ACCEPTANCE COMPANY, a Corporation, Defendant in Error,

vs.

R. H. DAVIS, Doing Business as DAVIS MOTOR SALES, Plaintiff in Error

Error to Cook Circuit

JUDGMENT—Feb. 7, 1934

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid is there anything erroneous, vicious, or defective; and that in the record this is no error: Therefore, it is considered by the Court that the Judgment aforesaid, be Affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Defendant in error recover of and from the

said Plaintiff in error its costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards on the 17th day of February A. D. 1934, there was filed in the office of the Clerk of said Court a certain petition for rehearing in said cause.

[fol. 52] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING REHEARING—Feb. 26, 1934

The Court having considered the petition of Plaintiff in error praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

And afterwards on the 6th day of March A. D. 1934, there was filed in the office of the Clerk of said Court a certain petition by Plaintiff in Error for a certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause.

[fol. 53] IN APPELLATE COURT OF ILLINOIS

[Title omitted]

ORDER DENYING MOTION FOR CERTIFICATE OF IMPORTANCE, ETC.—March 7, 1934

The Court having considered the motion of Plaintiff in error for a Certificate of Importance and an Appeal to the Supreme Court of Illinois in said cause or in the event said Certificate of Importance is denied that the issuance of the mandate in said cause be stayed pending the disposition of a petition for a Writ of Certiorari in the Supreme Court of the United States as per petition filed herein,

And being now fully advised in the premises doth order that said motion be and the same is hereby denied.

[fols. 54 & 55] In Appellate Court of Illinois

[Title omitted]

Order Allowing Motion for Stay of Mandate—March 9, 1934

On the Court's own motion, It is ordered that that part of the order of March 7th A. D. 1934 denying Plaintiff's in Error motion to stay mandate pending the disposition of a petition for a Writ of Certiorari in the Supreme Court of the United States be and the same is hereby vacated and set aside, and the Court upon reconsideration of said motion doth order that Plaintiff's in Error motion to stay mandate pending the disposition of a petition for a Writ of Certiorari in the Supreme Court of the United States be and the same is hereby allowed.

[fol. 56] In Appellate Court of Illinois

36473

Ætna Acceptance Company, a Corporation, Defendant in Error,

v.

R. H. Davis, Trading as Davis Motor Sales, Plaintiff in Error

Error to Circuit Court, Cook County

Opinion—Filed Feb. 7, 1934

Mr. Presiding Justice Hall delivering the opinion of the Court:

This is an appeal from a judgment of the Circuit Court of Cook County against defendant for the sum of $1,000.00 entered in an action in trover, brought by plaintiff to recover the value of an automobile, which it is alleged defendant wrongfully converted. The trial was by the court without a jury.

To the declaration filed in the case, defendant filed a plea of the general issue and a special plea alleging his dis-

charge in bankruptcy. To these pleas, plaintiff filed replications, in which it is alleged that the cause of action by plaintiff is predicated upon the charge of wilful and malicious injury to the plaintiff, and that the claim was created by fraud, misappropriation and embezzlement; that the plaintiff on July 10th, 1929, was the owner of an Auburn Sport Sedan, and on that day delivered it to the defendant under a series of documents known as a "floor plan" arrangement, providing that the title was retained in the plaintiff until the full sum of $1,181.87 should be paid by the defendant to the plaintiff; that the automobile should continue in the possession of the defendant until released from the floor plan arrangement, or removed by the plaintiff, and that said property should be returned to the plaintiff on demand; that the plaintiff should not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the prop- [fol. 57] erty, except on written order from the plaintiff releasing the same upon payment to plaintiff of the amount stipulated in the agreement; that notwithstanding said written agreements, the defendant, without the knowledge or consent of the plaintiff, without obtaining any release, and without paying the above sum of money, and in violation of the defendant's duties as bailee and trustee, some time subsequent to July 10th, 1929, sold, disposed of, and converted the property to his own use, and the proceeds of the sale thereof.

The defendant was in the business of dealing in automobiles in Oak Park under the name of Davis Motor Sales, and plaintiff was in the business of financing automobile dealers. On July 10th, 1929, defendant, as Davis Motor Sales by R. H. Davis, executed and delivered to plaintiff a chattel mortgage on an Auburn Sport Sedan, serial No. 27974808, motor No. 25943, to secure the payment on a note of that date for $1181.87. Also on the same date defendant gave to plaintiff what is referred to in the abstract as a trust receipt signed "Davis Motor Sales, by R. H. Davis," by which the receipt of the automobile described is acknowledged and by which the maker agreed to hold the automobile as the property of the Ætna Acceptance Company, for the purpose of storing the same, and agreed to keep it new and not to operate it for demonstration or otherwise, and to return the property to the Ætna Acceptance Company on demand. Also, by the terms of this agreement, it is agreed that the maker would not sell, loan, rent, de-

liver, mortgage, pledge or otherwise dispose of the automobile to any other person except upon the written order from the Ætna Acceptance Company for release from trust, upon payment to the company of the amount required by the order upon the endorsement on the back of this so-called trust receipt of a release from the trust alleged to have been created thereby. Also, there was delivered at the same time to the plaintiff a bill of sale dated July 19th, 1929, executed by Davis Motor Sales, by R. H. Davis, defendant, by which the automobile in question was conveyed to the plaintiff.

[fol. 58] The trial was by the court without a jury, and after considering the evidence, the court entered the following findings:

"The Court finds that the defendant was not actuated by any wilful or criminal intent in disposing of the car in question."

"The Court finds Robert H. Davis guilty of legal conversion of the property of the plaintiff as described in the count in trover heretofore filed herein."

"The Court finds that the defendant in this case was not actuated by any wilful, malicious or criminal intent in disposing of the car in question."

"The Court finds the defendant guilty of conversion."

Thereupon the court entered judgment in trover against defendant, and in and by such judgment assessed the plaintiff damages in the sum of $1,000.00 and costs of the suit. Defendant excepted to the entry of this judgment, and from this judgment the appeal herein was prayed and allowed.

The defendant urges as grounds for reversal that the alleged conversion of the car in question was not actuated by any wilful, malicious or criminal intent; that the claim of plaintiff against defendant was provable in bankruptcy, and that defendant's discharge in bankruptcy which was proven, acted as a discharge of the claim upon which the action herein is based. It is further contended by the defendant that he had the right to sell the car in question and apply the proceeds in payment of an amount alleged to be due from plaintiff to defendant in the sum of $1,238.40.

As to whether or not there must be a showing of malice or wrongful intent upon which to predicate an action in

trover, this court in Camper v. Eanis, 35 Ill. App. 37, said:

"A wrongful intent is not an essential element of the conversion. It is enough in this action, that the rightful owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it. Boyce v. Brockway, 31 N. Y. 490. A very slight agency or interference will make one liable in trover. Farrar v. Chauffetete, 5 Denic, 527; see Follett v. Edwards, 30 Ill. App. 386, and cases there cited."

[fol. 59] It is apparent from the various agreements made between the parties that the plaintiff retained all title, dominion and control over this automobile, that the defendant had no right to sell it without plaintiff's consent, and that he was guilty of wrongful conversion when he did so. After defendant sold this automobile, he filed a voluntary petition in bankruptcy and scheduled the claim of plaintiff made herein as a debt owed to plaintiff. Defendant was discharged in the bankruptcy proceeding, and now insists that such discharge is a bar to this proceeding. In Lester v. Southern Security Co., 147 S. E. Rep. 529, the court said:

"A creditor having a debt secured by title to property, where his debtor is adjudged a voluntary bankrupt, can, if he does not prove his debt in the bankruptcy court, institute an action in trover for the recovery of such property, and is entitled to obtain a money judgment against his debtor for the value of the property sued for, as against the plea of discharge in bankruptcy.

This court holds that this claim against defendant was not affected by defendant's discharge in bankruptcy. The judgment is, therefore, affirmed.

Affirmed.

Wilson and Medel, JJ., concur.

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] In Supreme Court of the United States, —— Term, A. D. 1934

[Title omitted]

Assignment of Errors

Now comes R. H. Davis, trading as Davis Motor Sales, the petitioner, and files this, his assignment of errors, complaining as follows:

1. The Appellate Court of Illinois erred in failing to hold that the claim of the respondent was a proveable and a dischargeable claim in bankruptcy and that since the respondent participated in the petitioner's bankruptcy proceeding, the petitioner was discharged from the respondent's claim upon receiving his discharge in bankruptcy.

[fol. 62] 2. The Appellate Court erred in failing to hold that since the petitioner was not guilty of any malice in disposing of the car in question, the petitioner was discharged from the claim of the respondent by virtue of Section 17 of the Bankruptcy Act or Section 35, Title 11 of Chapter 3 of Mason's United States Code Ann.

3. The Appellate Court erred in holding that the claim of the respondent was not affected by the petitioner's discharge in bankruptcy.

4. The Appellate Court erred in affirming the judgment of the trial court.

Respectfully submitted, Edward A. Zimmerman, Attorney for Petitioner.

[fol. 63] Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1934

The petition herein for a writ of certiorari to the Appellate Court of the State of Illinois, First District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,694. Illinois Appellate Court, First District. Term No. 68. R. H. Davis, trading as Davis Motor Sales, Petitioner, vs. Ætna Acceptance Company. Petition for a writ of certiorari and exhibit thereto. Filed May 26, 1934. File No. 68, O. T., 1934.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

MAY 2

CHARLES EL

IN THE

Supreme Court of the United States

October Term, A. D. 1934.

No. [redacted] 68

R. H. DAVIS trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

EDWARD A. ZIMMERMAN,
Counsel for Petitioner.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY,
a corporation,
Respondent.

No.....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court
of the United States:

Your petitioner, R. H. Davis, trading as Davis Motor Sales, respectfully represents and shows to this Honorable Court that he seeks a writ of certiorari to review a judgment of the Appellate Court of Illinois for the First District, affirming a judgment of the Circuit Court of Cook County, Illinois, in favor of Aetna Acceptance Company, a corporation, the respondent, the plaintiff in the trial court, in a suit in trover against the petitioner, the defendant in the trial court, for conversion of an automobile.

Statement of the matter involved.

The respondent brought a suit in the Circuit Court of Cook County, Illinois, in replevin against the petitioner to recover a certain Auburn automobile, but the automobile

not being recovered, the respondent, on December 24, 1929, filed a count in trover in the action, under the Illinois practice, alleging that the petitioner had wilfully, wrongfully, tortiously, and maliciously converted the chattel. (R. 1.) The petitioner thereupon filed a plea of the general issue and later a special plea, in which it averred that after the happening of the alleged grievances, the petitioner had been adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, and that he had been discharged from all debts and claims provable against his estate, including the claim of the respondent based upon the aforesaid judgment. (R. 2.) The respondent joined issues on this special plea by filing a replication setting forth that the cause of action arose by reason of the wilful and malicious acts of the petitioner as well as by his fraud, misappropriation, embezzlement or defalcation; that the respondent was seized of title to the automobile in question under certain documents creating a method of financing the sale of automobiles known as the "floor plan," whereby respondent financed automobiles sold by petitioner, the respondent retaining title thereto as security for the payment of $1,181.37; that the petitioner held the automobile under an agreement to hold it as respondent's property and not to sell or dispose of it until respondent had been paid said amount; and that the petitioner, without the knowledge and consent of the respondent, sold and converted the automobile. (R. 2-3.)

The trial court found that while the petitioner was guilty of conversion of the automobile (R. 4) that he had not been actuated by any wilful, malicious or criminal intent in disposing of the property. (R. 4, 5.) Damages were assessed in favor of the respondent in the sum of $1,000 and the Court entered judgment on the findings. A writ

of error was prosecuted in the Appellate Court of Illinois for the First District to review this judgment, but the judgment of the trial court was affirmed.

The facts.

The petitioner, during the transactions herein mentioned, operated a retail automobile sales business in Oak Park, Illinois, and the respondent during said period conducted an automobile finance business for the purpose of financing retail automobile dealers in the purchase of automobiles.

The automobile hereinabove mentioned was purchased by the petitioner from a distributor and placed on petitioner's salesroom floor. In order to obtain this automobile, petitioner borrowed from respondent the sum of $1,181.87, (R. 10) being ninety per cent of the purchase price. To insure the re-payment of this amount, petitioner gave respondent his note payable in thirty days and a trust receipt acknowledging that title to the automobile was in respondent. Petitioner also agreed to hold the automobile for respondent and not to encumber or dispose of it without respondent's consent. Petitioner also gave respondent a chattel mortgage and bill of sale on the automobile wherein petitioner warranted title in himself.

The petitioner, having the automobile on his salesroom floor for thirty days and being unable to dispose of it, gave a new note, trust receipt, chattel mortgage and bill of sale to respondent, all of which were substituted for the instruments originally given. (R. 9-10.)

Prior to the above transactions the respondent had financed from twenty-eight to thirty-five wholesale automobile transactions for the petitioner. In each of these instances the petitioner had been permitted to display the

automobile on his salesroom floor, and upon making a sale to receive the purchase price and remit the amount of the loan to respondent. (R. 7.) In none of these transactions was a formal release of the automobile given or requested. (R. 13.)

It was stipulated at the trial that the automobile was sold in the regular course of petitioner's business and that there had been no concealment. (R. 5.) The evidence showed that immediately following the sale the petitioner notified respondent thereof and requested it to send him a statement of the amount of credit due him, so that a settlement of the accounts between the parties could be effected. (R. 11, 15.) The evidence also showed that the respondent then owed petitioner the sum of $452.10 (R. 11, 17-18), and the further sum of $768.40 on a judgment which petitioner had paid on the account of respondent. (R. 13, 16.) Upon receipt of notice of the sale, the respondent sent a collector to the petitioner who demanded payment of the money realized from the sale of the automobile, but there is no evidence that any demand for the automobile was ever made. No statement of credit due petitioner was ever presented, and the account was never settled.

Thereafter the respondent filed the replevin suit to recover possession of the automobile. Immediately following, the petitioner filed his voluntary petition in bankruptcy as above stated, wherein the respondent was scheduled as a creditor. (R. 14.) In addition to the usual notice to scheduled creditors in bankruptcy, the respondent had knowledge of the proceeding which it derived from conducting an unsuccessful defense to an application by the bankrupt for an order to restrain it from proceeding with the replevin suit. (R. 22-23.) After petitioner received his discharge in bankruptcy, the respondent proceeded with

its suit under the trover count, and the special plea of petitioner, as above stated, setting up his discharge and alleging that the claim having been a claim provable in bankruptcy and that the respondent having notice thereof, the claim was discharged.

The respondent contended at the trial that it had title to the car by virtue of the trust receipt and chattel mortgage hereinabove mentioned, and that therefore the petitioner had no authority to sell the automobile without its consent; and that by petitioner's act of selling the automobile, he had committed a wilful, malicious and tortious act, giving rise to a claim not dischargeable in bankruptcy.

The petitioner proved at the trial that he had in the same way sold twenty-eight to thirty-five automobiles which had been financed by the respondent in the same manner; that in each instance the documents had been returned to him by the respondent after the loan on the automobile previously sold had been repaid, and that therefore he had had implied authority to sell and dispose of the particular automobile in the manner that it was sold (R. 11, 23-24); that he did not remit the proceeds to the respondent because of the aforesaid credit; that on September 13, 1929, and after the automobile was sold, he had been adjudged a bankrupt; that later, on June 9, 1930, he had received his discharge in bankruptcy (R. 15-16); and that respondent participated in the bankruptcy proceedings, and that it had been restrained from prosecuting the replevin suit by an order of the bankruptcy court entered on September 27, 1929. (R. 22.) The trial court specifically found as a fact that petitioner had not been guilty of any wilful malice or criminal intent in disposing of and in selling the automobile.

The Appellate Court of Illinois for the First District held that although petitioner was not guilty of any malice in disposing of the car, that the judgment in trover should be sustained, and that the claim of the respondent had not been discharged by the bankruptcy.

Reasons relied on for the allowance of the writ.

1. The decision of the Appellate Court of Illinois for the First District in holding the above claim was not discharged by the bankruptcy of petitioner, is contrary to the plain meaning and intent of Section 17 of the Bankruptcy Act.

2. The determination of the questions of the application of the Bankruptcy Act to the particular matter in issue has never been decided by this Court and is of great importance to automobile dealers and finance companies throughout the United States.

3. The judgment of the Appellate Court is contrary to law and the decisions of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court of Illinois for the First District, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings in the cause entered on its docket, No. 36473, entitled Aetna Acceptance Company, a corporation, defendant in error, *versus* R. H. Davis, trading as Davis Motor Sales, plaintiff in error, and that the said judgment of the Appellate Court of Illinois for the First District, may be

reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

And your petitioner will ever pray.

Respectfully submitted,

EDWARD A. ZIMMERMAN,
Counsel for said Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY,
a corporation,
Respondent.

No.....

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE APPELLATE COURT OF ILLINOIS.

The judgment of the Circuit Court of Cook County, Illinois, was entered on May 12, 1932. (R. 30.) The opinion of the Appellate Court of Illinois for the First District, was filed on February 7, 1934, affirming the judgment of the trial court and is printed in the record at pages 34 to 38.

II.

STATEMENT OF JURISDICTION.

The opinion of the Appellate Court of Illinois for the First District was entered of record on February 7, 1934. A petition for rehearing was filed by the petitioner on February 17, 1934. Rule 13 of the Appellate Court of Illinois for the First District, provides that a petition for rehearing is timely if filed within ten days after the decision of the said Appellate Court is entered of record. (Appendix.) An order of the Appellate Court denying the petition for rehearing was entered on February 26, 1934, and the judgment of the Appellate Court did not become final until the petition for rehearing was denied. *People* v. *Gilbert*, 281 Ill. 619.

Petitioner filed a petition in the said Appellate Court for a certificate of importance and appeal on March 7, 1934, nine days after the judgment of the said Appellate Court became final. Rule 22 of the Appellate Court of Illinois for the First District provides that application for leave to appeal on grounds of importance must be filed within twenty days after judgment in the said Appellate Court. (Appendix.)

The amount of the judgment was $1,000. Under Paragraph 203, Chapter 110 of Cahill's Revised Statutes of Illinois for 1933, being Section 75 of the Illinois Civil Practice Act, the judgment of the Appellate Court was final and not reviewable by any other Court of the State of Illinois unless the branch of the Appellate Court that heard the case, granted leave to appeal to the Supreme Court of Illinois on the grounds of importance. When the Appellate Court denied the petition for an appeal on the grounds of importance, the petitioner had no recourse to any tribunal

of the State of Illinois. The Appellate Court of Illinois was the highest court of the State of Illinois in which a decision could be had.

The jurisdiction of the Supreme Court of the United States to hear this petition and to grant the writ of certiorari prayed for is supported by Section 237b of the Judicial Code as amended by the Act of February 13, 1925. Under this statute the Supreme Court has jurisdiction of this cause.

Mellon v. *O'Neil,* 275 U. S. 212.

Western Union Tel Co. v. *Priester,* 276 U. S. 252.

Ches. & O. Ry. Co. v. *Mihas,* 280 U. S. 102.

Minn. St. P. & S. S. M. Ry. Co. v. *Rock,* 278 U. S. 593.

Central New Eng. Ry. Co. v. *Boston A. R. Co.,* 278 U. S. 596.

III.

STATEMENT OF CASE.

A full statement of the case is set forth in the petition.

IV.

SPECIFICATION OF ERRORS.

The Appellate Court of Illinois for the First District, erred:

1. In holding that the claim of the respondent was a claim not provable in bankruptcy, and that the petitioner was not discharged therefrom by the proceeding in bankruptcy.

2. In sustaining the judgment of the trial court.

V.

ARGUMENT.

The Appellate Court in sustaining the judgment of the trial court denied to the petitioner the rights accruing to him by virtue of his discharge in the bankruptcy proceeding had in conformity with the Bankruptcy Act.

The plea of the petitioner to the trover count created the issues whether:

1. The claim of the respondent was a claim provable in bankruptcy;

2. The petitioner was released from the claim by his discharge in the bankruptcy proceeding.

Section 63 of the Bankruptcy Act, (United States Code, Title 11, Section 103a):

> "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not. * * * (4) founded upon an open account or upon a contract expressed or implied. * * *"

The claim of the respondent was a liquidated claim evidenced by the note of petitioner and, therefore, was a claim provable in bankruptcy. The fact that the respondent could elect to recover from petitioner in a tort action does not change the character of the claim from one provable in bankruptcy to a claim not provable in bankruptcy. In Sec-

tion 767 of Vol. 2 of *Remington on Bankruptcy* (3d ed.), the author states:

> "However, in cases where tort may be waived and suit be brought in contract, the claim may be proved in bankruptcy."
>
> *Shall* v. *Camors,* 251 U. S. 239.
> *Crawford* v. *Burke,* 195 U. S. 176.
> *Clarke* v. *Rodgers,* 183 Fed. 518, aff'd in 228 U. S. 534.
> *Tindle* v. *Birkett,* 205 U. S. 183.

In Illinois it is well settled that although the act of a party converting the goods of another may be tortious, the owner may waive the tort and sue the wrongdoer in assumpsit on the common counts for money had and received or for goods sold and delivered.

> *T. W. & W. R. Co.* v. *Chew,* 67 Ill. 378.
> *DeClercq* v. *Mungin,* 46 Ill. 112.
> *City of Elgin* v. *Joslyn,* 136 Ill. 525.
> *Cushing* v. *Hayes,* 46 Ill. 145.
> *Donovan* v. *Purtell,* 119 Ill. App. 116, aff'd. 216 Ill. 629.

Under the foregoing authorities, the respondent's claim was provable in the petitioner's bankruptcy proceeding.

The second issue raised by the special plea was whether the petitioner was released from the claim of the respondent by the discharge of petitioner in the bankruptcy proceeding. The respondent's replication alleges that the act of the petitioner in selling the automobile was a malicious and wilful injury to the respondent and amounted to fraud, misappropriation, embezzlement and defalcation by the petitioner while acting in a fiduciary capacity. Respond-

ent's replication was predicated on Section 17 of the Bankruptcy Act (United States Code, Title 11, Section 35) which provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The trial court specifically found that the petitioner had not been guilty of any malicious, willful or criminal intent in selling the automobile. (R. 4, 5.) The parties to the suit stipulated that the automobile was sold in the regular course of business and that there had been no concealment of the sale. (R. 5.) By affirming the judgment without making any special findings of fact, the Appellate Court affirmed the findings of the trial court.

Knight v. *Seney,* 290 Ill. 11, 16.
Kee & Chapell Co. v. *Pennsylvania Co.,* 291 Ill. 248.

Since the evidence showed, and the trial court found, that the petitioner had not been guilty of any malice in disposing of the automobile and since the respondent was scheduled as a creditor and had knowledge of the bankruptcy proceedings, the respondent's claim does not come within the exceptions noted in clauses 2 and 4 of the above Section 17. It has been repeatedly held that in order to bring a claim

within the exception noted in clause 2 of the above Section 17 of the Bankruptcy Act, there must be a showing not only of a conversion but of a wilful and malicious conversion.

In Re Northrup, 265 Fed. 420, 421.
McIntyre v. *Kavanaugh,* 242 U. S. 138.
In Re Burchfield, 31 Fed.(2d) 118.
Walker Bros v. *Capital Grocery Co.,* 28 Ga. App. 531.
Wood v. *Fisk,* 215 N. Y. 233.
Andrews v. *Dresser,* 214 N. Y. 671.
Ulner v. *Doran,* 167 App. Div. (N. Y.) 259, 261.

Not every conversion constitutes a wilful and malicious injury. A malicious conversion has been defined as:

> "A wilful disregard of what one knows to be his duty and an act which is against good morals and wrongful in and of itself, which necessarily causes injury and is done intentionally."

Tinker v. *Colwell,* 193 U. S. 473, 487.
McIntyre v. *Kavanaugh,* 242 U. S. 138, 141.

The claim of the respondent does not come within the exception noted in clause 4 of the above Section 17. At the time the petitioner secured the money from the respondent, he executed a note and, as security for the payment of the note, executed a trust receipt acknowledging receipt of the automobile from the respondent and agreeing to hold the same as the property of the respondent. At the same time petitioner also executed a chattel mortgage to the respondent covering the automobile, and a bill of sale from the petitioner to the respondent acknowledging title in the petitioner.

The note was not paid when due and thereupon the petitioner executed anew, a note, trust receipt, chattel mort-

gage, and bill of sale. It has recently been held by the Supreme Court of Illinois that a contract of conditional sale which retained title in the vendor and a chattel mortgage on the same property could not both be effective at the same time, and that where a vendor who had retained title under a conditional sales contract accepted a chattel mortgage by a vendee, covering the same property, the chattel mortgage extinguished the conditional sales contract, and that the title of the vendee thereby became absolute, subject to the lien of the chattel mortgage.

Maxcy-Barton Organ Co. v. *Glen Corp.*, 355 Ill. 228, 242.

To the same effect are:

Premier Potter Printing Press Co. v. *Fuller*, 294 Fed. 451.

Nordone v. *Austin Drainage Excavator Co.*, 185 N. Y. S. (App. Div.) 309.

Buckeye Cotton Oil Co. v. *Westerfield*, 186 Ark. 505.

It has been held that where a conditional sales contract and a chattel mortgage were executed simultaneously to secure the purchase price of an article, the provisions of the conditional sales contract which retained title in the vendor were inconsistent with the provisions of a chattel mortgage and that any doubt as to what was intended by the parties would be resolved in favor of the presumption that an absolute sale was intended and that both instruments were intended as a chattel mortgage.

International Harvester Co. v. *Threlkeld*, 226 Mo. App. 600.

Aultman & Co. v. *Silha*, 85 Wis. 359.

In Illinois a bill of sale given as security for a debt is in effect a chattel mortgage. *Whittemore* v. *Fisher,* 132 Ill. 243. The acceptance by the respondent of a bill of sale in which the petitioner acknowledged and warranted that he was the lawful owner of the automobile, and which, together with the chattel mortgage, must be taken as a chattel mortgage on the automobile, estopped the respondent from denying that title and ownership of the automobile was in the petitioner.

Maxcy-Barton Organ Co. v. *Glen Corp.,* 355 Ill. 228, 242.
Trustees of Schools v. *Wilson,* 215 Ill. 352.
Second Nat. Bank v. *Gilbert,* 174 Ill. 485.
Jeffery v. *Robbins,* 167 Ill. 375.

Under the above decisions, the respondent was merely a creditor of the petitioner and there existed no fiduciary relationship between the parties. Section 17 (4) of the Bankruptcy Act does not refer nor apply to the relationship existing between a debtor and his creditor.

Upshur v. *Briscoe,* 138 U. S. 365.
Hennequin v. *Clews,* 111 U. S. 676.
Palmer v. *Hussey,* 119 U. S. 96.
Cronan v. *Cotting,* 104 Mass. 245.

No fiduciary relationship existed between the parties, hence Section 17 (4) of the Bankruptcy Act has no application to respondent's claim.

By the decisions of the Supreme Court in *Crawford* v. *Burke,* 195 U. S. 176, and *Tindle* v. *Birkett,* 205 U. S. 183, it is now definitely settled that the words "while acting in a fiduciary capacity" limit and qualify each of the words "fraud, embezzlement and misappropriation as well as the

word defalcation'' mentioned in Section 17 (4) of the Bankruptcy Act.

The Appellate Court of Illinois for the First District, relied on the case of *Lester* v. *Southern Security Co.*, 168 Ga. 307. The Court there in rendering its decision applied the same rule laid down in the case of *Citizens Bank* v. *Mullis,* 161 Ga. 371, which presented a similar state of facts as that in the former case. In referring to the latter case, Mr. Remington in his work on Bankruptcy, (Vol. 7, 3rd ed., Sec. 3552, page 202 of the supplement) states:

> ''The dissenting opinion represents the better reasoning and the court's decision is wrong.''

In conclusion we urge that since the claim of the respondent was a claim provable in a bankruptcy proceeding, and since the respondent had the opportunity to assert the said claim in the petitioner's bankruptcy proceeding, and since the trial court found that the petitioner was not guilty of any malicious intent in disposing of the automobile, the exceptions noted by Section 17 (2) and (4) of the Bankruptcy Act have no application to the respondent's claim, and therefore that the Appellate Court erred in sustaining the judgment of the trial court; that said decision is contrary to the plain meaning and intent of Section 17 of the Bankruptcy Act and that the said Appellate Court misapplied the provisions of that section in determining this cause.

We therefore respectfully submit that the petition for certiorari should be allowed and that the writ prayed for should be granted.

Respectfully submitted,

EDWARD A. ZIMMERMAN,
Counsel for Petitioner.

APPENDIX.

Rules of the Appellate Court of Illinois, First District.

Rule 13.

PETITION FOR REHEARING.

Within ten days after a decision is entered of record the party desiring a rehearing shall give notice in writing to the opposite party or his attorney of his intention to make application therefor, and shall within said ten days file with the clerk of this court a copy of such notice, with proof of due service thereof and seven printed copies of the petition for a rehearing. Cover color to be light green. Such petition shall state concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon. In no case will any argument be permitted in support of such petition. This rule will be strictly enforced, and any petition in violation thereof will be stricken from the files. If a rehearing be granted, the case will be reconsidered upon the record, abstracts, original briefs, petition and any answer thereto of which seven printed copies shall have been filed with the clerk of the court within ten days after the order granting a rehearing is entered of record.

Rule 22.

CERTIFICATE OF IMPORTANCE.

(1) When the Appellate Court has granted leave to appeal to the Supreme Court on the ground of importance, the clerk of the Appellate Court shall transmit to the clerk of

the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto, and the certificate of importance of the Appellate Court. Applications for leave to appeal on the ground of importance shall be made by printed or typewritten petitions clearly setting forth the grounds relied upon by the party asking the same, and must be presented to the court, if in session, or to a majority of the judges, if in vacation, within twenty days after entry of judgment in the Appellate Court. The Appellate Court may require bond as a condition of granting leave to appeal on the ground of importance.

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 68

R. H. DAVIS, TRADING AS DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR PETITIONER.

I.

OPINION UNDER REVIEW.

The opinion of the Appellate Court of Illinois, First District, in this case, was filed on February 7, 1934, but has not been officially reported. The opinion is set out in the record (p. 30) on file in this Court.

II.

JURISDICTION.

The opinion of the Appellate Court of Illinois, First District, was entered of record on February 7, 1934. A petition for rehearing (R. 29) was filed by petitioner on February 17, 1934, within the ten days provided by Rule 13 of the said Court as set out in the appendix. The order of the said Appellate Court denying the petition for rehearing was entered on February 26, 1934 (R. 29), thereby making the judgment of the Court final on said date (*People* v. *Gilbert,* 281 Ill. 619). Petitioner filed his petition in the said Appellate Court for a Certificate of Importance and Appeal on March 7, 1934 (R. 29), within twenty days after the judgment of the Court became final, as provided by Rule 22 of the said Appellate Court, set out in the appendix.

The judgment (R. 28) rendered in the trial Court, and affirmed by the Appellate Court of Illinois, First District, was for the sum of $1,000. (R. 32.) Under Section 203 (2), Chapter 110 of Cahill's Revised Statutes of Illinois (1933), being Section 75 (2) of the Illinois Civil Practice Act, set out in the appendix, the judgment of the Appellate Court was final and not reviewable by any other court of the State of Illinois, unless the branch of the Appellate Court that heard the case, granted leave to appeal to the Supreme Court of Illinois on the grounds of importance. The said Appellate Court denied the petition for a certificate of importance and an appeal, thereby denying petitioner recourse to any tribunal of the State of Illinois. The Appellate Court of Illinois was the highest court of the State of Illinois in which a decision could be had.

The jurisdiction of the Supreme Court of the United

States to grant the writ of certiorari and to review the aforesaid judgment of the Appellate Court of Illinois, First District, is conferred by Section 237 (b) of the Judicial Code (United States Code, Title 28, Section 344 (b)), as amended by the Act of February 13, 1925. Said statute is set out in the appendix.

Minneapolis etc. Ry. Co. v. *Rock*, 279 U. S. 593.
Central New England Ry. Co. v. *Boston Co.* 279 U. S. 415.
Mellon v. *O'Neill*, 275 U. S. 212.
Western Union Tel. Co. v. *Priester*, 276 U. S. 252.
Gregory v. *McVeigh*, 90 U. S. 294.

III.

STATEMENT OF THE CASE.

This cause comes before this Court on a writ of certiorari to the Appellate Court of the State of Illinois, First District. (R. 34.)

The Aetna Acceptance Company, the respondent herein, filed its suit in the Circuit Court of Cook County, Illinois, a court of general jurisdiction, in replevin against R. H. Davis, trading as Davis Motor Sales, the petitioner herein (R. 1), on September 25, 1929 (R. 16), to recover possession of a certain Auburn automobile. The automobile not being recovered under the writ, the respondent on December 24, 1929 (R. 1), filed a count in trover in the action, under the Illinois practice, alleging, in addition to the usual fiction in trover, that the petitioner had wilfully, wrongfully, tortiously and maliciously converted the chattel in question. (R. 1.) The petitioner thereupon filed a plea of the general issue and later a special plea in which he averred that after the happening of the alleged grievances, he had been adjudicated a bankrupt by the District

Court of the United States for the Northern District of Illinois, Eastern Division, and that in said proceeding he had been discharged from all debts and claims provable against his estate, including the claim of respondent upon which the aforesaid suit was based. (R. 2.) The respondent joined issue on this special plea by filing a replication, in which it averred that the cause of action arose out of a wilful and malicious injury by the petitioner to the property of the respondent, and that the claim was created by the fraud, misappropriation, embezzlement or defalcation of the petitioner while acting in a fiduciary capacity. The replication further alleged that the respondent was seized of title to the automobile under certain documents creating a method of financing the sale of automobiles known as the "floor plan," whereby respondent financed automobiles sold by petitioner, and that the respondent had title thereto as security for the payment of the sum of $1,181.37 which respondent had advanced to petitioner for the purchase of said automobile, and which was the amount claimed by respondent in the suit (R. 2); that the petitioner held the automobile under an agreement to hold it as respondent's property and not to sell or dispose of it until respondent had been paid said amount; and that petitioner, without the knowledge and consent of respondent, sold and converted the automobile. (R. 3.)

Trial was had to the Court without the intervention of a jury. (R. 3.) The evidence showed that the petitioner, during the transactions alleged, operated a retail automobile sales business in the Village of Oak Park, Illinois (R. 6), and that the respondent, during said period, conducted an automobile finance business for the purpose of financing retail automobile dealers in the purchase of automobiles, and that the respondent for a considerable period of time had financed the purchase of automobiles for resale by the petitioner. (R. 8.)

The automobile sought to be replevined was purchased by the petitioner from a distributor and placed on petitioner's salesroom floor. (R. 6, 17.) In order to obtain this automobile, petitioner borrowed from respondent the sum of $1,181.87, which was ninety per cent of the purchase price of the chattel. (R. 5.) To insure the repayment of this amount, petitioner gave respondent his note payable in thirty days, and a trust receipt reciting that petitioner had received the automobile, that he agreed to hold the property as the property of respondent for the purpose of storing the same, that he would not operate the automobile for demonstration or otherwise, and that he would return the property to respondent on demand. The trust receipt also recited that petitioner would not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the automobile except upon written order of respondent, and payment to respondent of the amount of respondent's advance. (R. 7.) The evidence further showed that petitioner also gave respondent a chattel mortgage, and a bill of sale covering the automobile, in which petitioner warranted title to be in himself. All of these documents were attached together and executed simultaneously. (R. 7.)

It was further shown that the petitioner had the automobile on his salesroom floor for thirty days, and being unable to dispose of it upon maturity of the above obligation, gave a new note, trust receipt, chattel mortgage and bill of sale to respondent identical with the previous documents, all of which were substituted for the instruments originally given. (R. 4.)

The evidence further showed that prior to the above transactions, the respondent had financed from twenty-eight to thirty-five wholesale automobile transactions for petitioner (R. 8); that in each of these instances the petitioner had been permitted to display the automobile on his salesroom floor, and that upon the petitioner making

a sale of an automobile, he would receive the purchase price from the customer and remit the amount of the loan to respondent. (R. 8.) In none of these transactions was a formal release of the automobile ever given to, or requested by, respondent in advance of the particular sale. (R. 8.) The evidence showed that petitioner sold the aforesaid automobile on August 3, 1929 (R. 8), and it was stipulated at the trial that the automobile had been sold in the regular course of petitioner's business, and that petitioner had not been guilty of any concealment in respect to this particular sale. (R. 4, 8.)

The evidence further showed that immediately following the above sale, the petitioner notified respondent thereof, as had been his practice, and that he requested it to send him a statement of the amount of credit then due him, in order that a settlement of the accounts between the parties could be effected (R. 8); that the respondent at the time of the sale owed petitioner the sum of $452.10 (R. 13), and the further sum of $768.40 (R. 11) on a judgment which petitioner had paid as guarantor on the account of respondent. (R. 9.) That upon receipt of notice of the sale, the respondent sent a collector to the petitioner who demanded payment of the note, and that other demands for payment were later made by respondent, but that no demand was ever made for the possession of the automobile, nor did respondent ever present a statement or credit due petitioner, and that the account was therefore never settled. (R. 8.)

The evidence further showed that on September 13, 1929, the petitioner filed his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 11.) The evidence also showed that the respondent was duly scheduled, both as a secured and unsecured creditor therein, and that the respondent (R. 10), in addition to re-

ceiving the usual notice to scheduled creditors in bankruptcy, had actual notice of the proceeding, which it derived from conducting an unsuccessful defense to an application by the bankrupt for an order to restrain respondent from proceeding with the replevin suit; (R. 16) that petitioner was duly discharged in bankruptcy, on June 9, 1932 (R. 11), and that thereupon the respondent proceeded with this suit under the issues hereinbefore mentioned.

At the conclusion of the trial the Court assessed damages in favor of respondent in the sum of $1,000 and entered judgment on the findings. (R. 18.) The trial court also specially found, at the request of petitioner, that although the petitioner had been guilty of conversion of the property, that petitioner had not been actuated by any wilful, malicious or criminal intent in disposing of the automobile. (R. 18.) A writ of error was duly prosecuted in the Appellate Court of Illinois, First District, by the petitioner, to review this judgment, but the judgment of the trial court was affirmed.

IV.

SPECIFICATION OF ERRORS.

1. The Appellate Court of Illinois, First District, erred in affirming the judgment of the trial court.

2. The said Appellate Court erred in its judgment in denying to petitioner the rights, privileges and immunities extended to him under Section 17 of the Bankruptcy Act.

3. The said Appellate Court erred in its judgment in holding that the claim of respondent had not been discharged in petitioner's bankruptcy proceedings.

V.

SUMMARY OF ARGUMENT.

A. The claim of respondent was provable in the bankruptcy proceeding.

B. The claim of respondent was not exempt from discharge under any of the Exceptions enumerated in Section 17 of the Bankruptcy Act.

(a) Exception (2).

1. The judgment was for a technical conversion.

(b) Exception (3).

(c) Exception (4).

VI.

ARGUMENT.

A. The claim of respondent was provable in the bankruptcy proceeding.

1. The claim of respondent was provable under either sub-Sections (1) or (4) of Section 63 of the Bankruptcy Act (United States Code, Title 11, Section (103a)), which provides in part as follows:

> "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not. * * *
>
> (4) founded upon an open account, or upon a contract express or implied; * * *."

The evidence showed that respondent's claim was evidenced by a promissory note dated July 10, 1929, payable in thirty days from date (R. 4), secured by a lien upon the automobile. (R. 7.) The claim was therefore provable in bankruptcy under sub-Section (1) of the above statute.

In re Worcester County (C. C. A. 1), 102 Fed. 808.

In re Kyte (D. C. Pa.), 164 Fed. 302.

The claim was also provable under sub-Section (4) as a claim founded upon an implied contract. The election of respondent to sue petitioner in tort instead of in contract did not change the character of the claim so as to make it not provable in bankruptcy. Volume 2, Section 767, *Remington on Bankruptcy* (Fourth Edition), where the author states:

> "However, in cases where the tort may be waived and suit brought in contract, the claim may be proved in bankruptcy; * * *."

To the same effect is *Crawford* v. *Burke,* 195 U. S. 176, 193, where it was said:

> "We are, therefore, of opinion that if a debt originates or is 'founded upon an open account, or upon a contract, express or implied,' it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of an assumpsit, for a balance due upon an open account."

See also:

Tindle v. *Birkett,* 205 U. S. 183.
Clarke v. *Rodgers* (C. C. A. 1), 183 Fed. 518.
Shall v. *Camors,* 251 U. S. 239.
City of Elgin v. *Joslin,* 136 Ill. 525.
Toledo, Wabash & Western Ry. Co. v. *Chew,* 67 Ill. 378.
De Clercq v. *Mungin,* 46 Ill. 112.
Cushing v. *Hayes,* 46 Ill. 145.

B. The claim of respondent was not exempt from discharge under any of the exceptions enumerated in Section 17 of the Bankruptcy Act.

That part of Section 17 of the Bankruptcy Act here under discussion (United States Code, Title 11, Section 35), provides as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the procedings in bankruptcy; or (4) were created by his fraud, embezzlemen, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity;"

From the language of the above statute it clearly ap-

pears that a bankrupt is discharged from all *provable* debts except those enumerated within the exceptions, and we have shown the claim to have been provable. We shall now show that the claim was not embraced in any of the exceptions of Section 17 of the Bankruptcy Act.

As hereinabove stated, the petitioner in his special plea averred that he had, after the happening of the alleged grievances, been adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, Eastern Division, and that he had been discharged from all debts and claims provable against his estate, including the claim of the respondent, upon which the suit was based. The respondent joined issue on this special plea by filing a replication in which it averred that the cause of action arose out of the wilful and malicious acts of the petitioner, and by his fraud, misappropriation, embezzlement or defalcation. The issue presented was whether the claim had been discharged under Section (2) or Section (4) of the above statute. The trial Court, after hearing the evidence, found petitioner guilty of conversion of the automobile, and specially found that petitioner had not been actuated by any wilful, malicious or criminal intent in selling the automobile. (R. 18.) However, the burden of proof was upon respondent to show his claim within one of the exceptions of Section 17 of the Bankruptcy Act, and the record shows that this burden was not sustained.

In re Levitan (D. C. N. J.), 224 Fed. 241.
In re Grout, 88 Vt. 318.
Sherwood v. *Mitchell,* 4 Denio (N. Y.) 435, 17 N. Y. Com. Law R. 629.

(a) Exception (2).

The claim was not exempt from the operation of the bankrupt's discharge because it was not a liability for obtaining property by false pretenses or false representa-

tions, or for wilful and malicious injuries to the person or property of another.

1. The judgment was for a technical conversion.

The trial Court, at petitioner's request, having made the special finding that petitioner had not been actuated by any wilful, malicious or criminal intent in disposing of the automobile (R. 18), the character of the conduct of the petitioner in selling the automobile was foreclosed from further inquiry. If a conversion at all, it was simply a technical conversion. The trial Court failed to give legal effect to its special finding, and the Appellate Court of Illinois, in affirming the judgment of the lower Court, likewise failed, in holding the claim had not been discharged, to give legal effect to that finding. The special finding of the trial court was binding upon the said Appellate Court (*Knight* v. *Seney,* 290 Ill. 11).

Since the trial court found the defendant guilty of a technical conversion, free from any element of wilful, malicious or criminal conduct on the part of the petitioner, the character of the respondent's claim reduces itself to a mere naked judgment for $1,000, and nothing more. That this judgment was rendered notwithstanding the special findings shows that the trial Court undoubtedly based the judgment upon the petitioner's failure to pay the promissory note in evidence, rather than upon any act or acts of conversion, of which the record is barren. A person, however, may be guilty of an innocent or unintentional conversion without the wilful or malicious element.

In *Crawford* v. *Burke,* 195 U. S. 176, this Court said:

> "In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks, and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and

without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover, based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that, as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy."

Also in the case of *In re DeLauro* (D. C. Conn.), 1 Fed. Supp. 678, 679, the Court stated:

"And trover, the classic form of remedy for a wrongful conversion, may or may not include the element of willful and malicious wrongdoing. Thus, in the case of *McIntyre* v. *Kavanaugh*, 242 U. S. 138, 37 S. Ct. 38, 61 L. Ed. 205, it was held that the conversion there under consideration was in fact willful and malicious, and hence nondischargeable in bankruptcy. Yet conversion may occur without the presence of that element, and in such cases is a liability dischargeable in bankruptcy."

To the same effect is *Swift & Co.* v. *Bullard & Son* (D. C. Ga.), 3 F. (2d) 814, 816, where the language is:

"The circumstances here tend rather to show a loss of the proceeds by bad collections and an appropriation of any that were collected because of a mistaken belief as to the effect of the "no collateral' indorsement, which is far from willful and deliberate conversion. *Walker Bros.* v. *Capital City Grocery Co.*, 28 Ga. App. 531, 112 S. E. 157; *White* v. *Morris Fertilizer Co.*, 31 Ga. App. 710, 121 S. E. 704. 'Dischargeability will be decreed in all cases such as those of agents, brokers, factors, auctioneers, conditional vendess, and the like, where there is neither a technical trust in the inception of the contractual relation, nor moral turpitude in the breach of it.' Collier on Bankruptcy (13th Ed.) p. 609."

And in *Wood* v. *Fisk,* 215 N. Y. 233, the Court speaking through Judge Cardozo stated:

> "The plaintiff makes the additional point that, even though his claim was provable, it was excepted from the operation of the discharge. He argues that it was, within the meaning of section 17 of the Bankruptcy Act, a liability for 'willful and malicious injuries to the property of another.' We held in *Kavanaugh* v. *McIntyre,* 128 App. Div. 722, 112 N. Y. Supp. 987; Id., 210 N. Y. 175, 104 N. E. 135, and again in *Andrews* v. *Dresser,* 214 N. Y. 671, 108 N. E. 1088, that there may be acts of conversion so wanton as to be included in that exception. Those were cases where the charge of conversion was equivalent to a charge of larceny. We think the misuse of the plaintiff's securities is not to be classified as a willful and malicious injury within the meaning of that statute. *Johnson* v. *Bruckheimer,* 133 App. Div. 649, 118 N. Y. Supp. 189; *Allen* v. *Fromme,* 195 N. Y. 404, 407, 88 N. E. 645. The repledge, unlike a sale, left the general property in the plaintiff; it gave rise, until followed by bankruptcy, to nominal damages only; and, so far as there was any willful conversion, it was therefore partial and technical, rather than absolute and malicious."

Of like effect is *Walker Bros. Co.* v. *Capital City Grocery Co.,* 28 Ga. App. 531, where it was said:

> "It is contended by the defendant in error that the bankrupt's debt falls within the exception created by subdivision 2 of the act, to with, the willful and malicious injury to the property of another. This contention is without merit, since it appears from the petition for certiorari and the answer thereto that the plaintiff's claim was duly scheduled as a liability of the bankrupt, and that the money judgment obtained in the trover suit was taken pending the bankruptcy proceedings of which the plaintiff had notice, and also that the conversion of the property in question was merely technical, without actual fraud or malice."

Of like effect are:

In re Levitan (D. C. N. J.), 224 Fed. 241.

Ferdinand v. *Cooke,* (N. J. Supp.), 115 Atl. 439 (not officially reported).

State v. *Beck*, 175 Ind. 312.
Crosby v. *Miller Co.*, 25 R. I. 172.
Volume 7, Section 3552, *Remington on Bankruptcy* (Fourth Edition).
In re Northrup (D. C. N. Y.), 265 Fed. 420.
Andrews v. *Dresser*, 214 N. Y. 671.

The rule stated in the preceding cases applies *a fortiori* to the case at bar where the judgment for conversion was rendered against petitioner with a special finding that petitioner had not been actuated by any wilful, malicious or criminal intent in selling the property.

In re Dixon (D. C. N. Y.), 21 F. (2d) 565, 566 is a case in point. In that case a stay of execution was sought to prevent the enforcement of a judgment rendered in the state court. The suit had been brought against certain corporate directors under the plaintiff's allegation "for obtaining property by false pretences or false representations, or for wilful and malicious injuries to the person or property of another." Verdict for plaintiff. The jury specially found that "no fraud, embezzlement, misappropriation, or defalcation was committed." In granting the stay, and in holding the judgment dischargeable in bankruptcy, the Court stated that it was bound by the pleadings, findings and judgment of the state court, and that it could not inquire into the character of the evidence therein taken, in order to ascertain the nature of the judgment. The relevant quotations from the opinion are:

> "It is well settled that a judgment *ex delicto* is a fixed liability, and, if owing at time of filing petition in bankruptcy, a release may be had unless it constitutes a liability 'for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another.' To ascertain the character of the liability merged in the judgment, recourse must be had to the pleadings and findings of fact by the trial court. Plaintiffs

maintain that the liability arose out of willful and malicious injuries to the person and property of the bank in whose behalf the judgment was recovered."

* * * * * *

"But the findings of the jury and of the court, as to both bankrupts, were that 'no fraud, embezzlement, misappropriation, or defalcation was committed.' This court is bound by the pleadings, findings, and judgment as to the particular matters in litigation before the state court. *Harper* v. *Rankin* (C. C. A.) 141 F. 626. The record before me does not show recovery for fraud, false pretences, or false representations, and no act essentially an act involving willful and malicious injuries to the person or property of another is specified or apparent."

* * * * * *

"Counsel for plaintiffs argued that, to determine the character of the basis for the judgments, it is necessary to examine, not only the pleadings, findings, and judgments, but also the evidence to discover the asserted willful and malicious injury to the bank. But the court is not, in my opinion, required to draw inferences from the evidence."

Of like holding is *In re Burchfield* (D. C. N. Y.), 31 F. (2d) 118, 119. A motion was there made to stay execution on a judgment obtained in the state court where the defendant was charged with fraud and deceit. Verdict was for plaintiff. The jury specially found that the money had not been obtained through fraud. The Court, in granting the stay, held that the special finding was conclusive, and that therefore the claim had been discharged. The language is:

"The first question asked the jury to determine whether the bankrupt received from the plaintiff a certain sum of money; the second question asked the jury to determine whether the plaintiff was entitled to a judgment for that sum of money including interest; and the third question asked the jury specifically to say whether or not this money was obtained by the bankrupt by fraud and deceit. It seems to me that the verdict of the jury based upon the replies to these three questions submitted to them without objection,

> and consequently with the approval of counsel for both parties, definitely determines the character of the judgment returned. It is that the money was obtained by the bankrupt from the plaintiff without fraud and deceit, and therefore without willful and malicious injury to the plaintiff within the accepted definition of those words as set forth in *Tinker* v. *Colwell* and *McIntyre* v. *Kavanaugh, supra.*"

Further confirmation of the same rule is found in:

Flanders v. *Mullin,* 80 Vt. 124.

Peters v. *United States ex rel. Kelley* (C. C. A. 7), 177 Fed. 885.

In re Nordlight (D. C. N. Y.), 3 Fed. Supp. 486.

Chambers v. *Kirk,* 41 Okla. 696.

We have now shown by the overwhelming authorities, that a judgment based upon a technical conversion—and in this case the Court found that petitioner had not been actuated by any wilful, malicious or criminal intent in disposing of the automobile—is not embraced within Exception (2) of Section 17 of the Bankruptcy Act. The trial court, having made the finding that the petitioner was guilty of a technical conversion, and nothing more, the Appellate Court erred in not giving effect to that finding by holding the claim to have been discharged.

The Appellate Court of Illinois, First District, in its decision here under review, in citing and quoting from *Campau* v. *Bemis,* 35 Ill. App. 37 (R. 33), recognized the Illinois rule that a wrongful intent is not an essential element in a technical conversion. But it misconceived the legal effect of a technical, as compared with a wilful and malicious, conversion, in holding, on the authority of *Lester* v. *Southern Security Co.,* 168 Ga. 307, that the claim had not been discharged. (R. 33.)

The last mentioned case is a syllabus opinion which cites only *Citizens' Bank* v. *Mullis,* 161 Ga. 371, as its authority.

The case is clearly against the great weight of authority, as herein set out, and the few cases in the Georgia Courts, which lend support to it, are spurious and stand by themselves. However, in *Lester* v. *Southern Security Co.* 168 Ga. 307, the judgment creditor held title to the property; in the case at bar the respondent, as hereinafter appears, had only a lien upon the property which petitioner sold with consent implied from a course of dealing with respondent. (R. 8.) The petitioner does not admit he was guilty of conversion, whether technical or wilful and malicious, for conversion is an offense against title, and the respondent at no time was seized with title to the automobile.

In *Citizens' Bank* v. *Mullis,* upon the authority of which *Lester* v. *Southern Security Co.* is based, the majority opinion of the Court is stated in the syllabus, which opinion misconceives the case of *McIntyre* v. *Kavanaugh,* 242 U. S. 138, therein cited. *Citizens' Bank* v. *Mullis* contains a well-reasoned dissenting opinion, concerning which the author, in Volume 7, Section 3552, *Remington on Bankruptcy* (Fourth Edition), comments:

> "The dissenting opinion represents the better reasoning and the Court's decision is wrong."

No claim was made in the pleadings or at the trial that the claim was a liability for obtaining property by false pretences or false representations under the first part of Exception (2) of Section 17 of the Bankruptcy Act, and therefore the same need not be considered.

(b) Exception (3).

Nor was any claim made that the respondent had not been duly scheduled as a creditor in ample time for proof and allowance of its claim, nor that respondent did not have actual knowledge of the bankruptcy proceeding. The record shows that petitioner was adjudicated a bankrupt on

September 13, 1929, (R. 11) and that the respondent was duly scheduled as a creditor. (R. 10.) In addition, respondent had actual knowledge of the bankruptcy proceeding on December 27, 1929, when it appeared and filed an answer (R. 16) therein and made a futile attempt (R. 17) to prevent the issuance of an injunction to stay this suit in the trial court. The burden, however, was upon respondent to plead and prove lack of notice, which of course it could not do.

Bailey v. *Gleason*, 76 Vt. 115.

(c) Exception (4).

The claim was not exempt from the operation of the bankrupt's discharge because it was not a liability created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.

We have already seen that the Court specially found that petitioner, in selling the automobile, had not been guilty of any wilful, malicious or criminal intent. (R. 18.) Therefore the petitioner could not have been guilty of actual fraud or intentional wrong. The word "fraud" as used in Exception (4) of section 17 of the Bankruptcy Act means actual fraud and intentional wrong. It does not embrace constructive fraud or fraud in law.

Neal v. *Clark*, 95 U. S. 704.
In re Blumenberg (D. C. Tenn.), 94 Fed. 476.
Western Union Coal & Storage Co. v. *Hurd* (D. C. Mo.), 116 Fed. 442.
Bracken v. *Milner* (C. C. Mo.), 104 Fed. 522.
Lund v. *Bull*, 76 N. H. 132.
Louisville etc. Railway Co. v. *Bryant*, 149 Ky. 359.

The language of Exception (4) "While acting in a fiduciary capacity" limit and qualify each of the words

"fraud," "embezzlement," "misappropriation" and "defalcation."

Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Bullis v. *O'Beirne*, 195 U. S. 606.
Bloomingdale v. *Dreher* (C. C. A. 3), 31 F. (2d) 93.
In re Ennis (D C. N. Y.), 171 Fed. 755.
Lund v. *Bull*, 76 N. H. 132.

The fraud, embezzlement or misappropriation, as well as the defalcation, must have been committed while acting as an officer or in a fiduciary capacity. The Exception refers only to a technical or express trust.

Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Hennequin v. *Clues*, 111 U. S. 676.
Fleitas v. *Richardson*, 147 U. S. 550.
Chapman v. *Forsythe*, 2 How. 202.
In re Camelo (D. C. N. Y.), 195 Fed. 632.
Bills v. *Schielp* (C. C. A. 2), 127 Fed. 103.
Barrett v. *Prince* (C. C. A. 7), 143 Fed. 302.
Keefauver v. *Hevenor*, 148 N. Y. Sup. 434.
Mulock v. *Byrnes*, 129 N. Y. 23.
Reeves v. *McCracken*, 69 N. J. Eq. 203.

"Fiduciary capacity" as used in Exception (4) implies a fiduciary relationship existing previously to, or independently of, the particular transaction out of which the debt arose. In the case at bar if such a relationship existed, it arose out of the same transaction.

Upshur v. *Briscoe*, 138 U. S. 365.
Bloomingdale v. *Dreher* (C. C. A. 3), 31 F. (2d) 93.
Cronan v. *Cotting*, 104 Mass. 245.
Bryant v. *Kinyon*, 127 Mass. 152.
American Agr. Chemical Co. v. *Berry*, 110 Me. 528.
Glasco v. *Cooper*, 17 Ga. App. 690.

Martin v. *Starrett*, 97 Neb. 653.
First National Bank of Enosburg Falls v. *Bamforth*, 90 Vt. 75.

As hereinbefore appears, the petitioner was engaged in the retail sale of automobiles in the Village of Oak Park, Illinois, (R. 6) and the respondent was engaged in the business of financing automobile dealers in the purchase of automobiles. (R. 4.) The automobile hereinbefore mentioned was purchased by the petitioner from a wholesale distributor and placed on petitioner's sales room floor. (R. 6.) In order to obtain this automobile, petitioner borrowed from respondent the sum of $1,181.89, being ninety per cent of the purchase price, which, together with the remaining ten per cent thereof, advanced by petitioner, was paid to the distributor. (R. 4.) To insure repayment of the amount loaned by respondent, petitioner gave respondent his promissory note payable in thirty days and a "trust receipt" acknowledging possession of the automobile, and reciting that petitioner held the automobile for respondent, and that petitioner would neither encumber nor dispose of it without respondent's consent. In addition to the foregoing documents, petitioner also gave respondent a chattel mortgage and bill of sale on the automobile. In the bill of sale petitioner warranted title to the automobile to be in himself. (R. 7.)

The petitioner, having the automobile on his salesroom floor for a period of thirty days, and being unable to dispose of it within that time, and his obligation to respondent having become due, on July 10, 1929, gave respondent a new promissory note payable in thirty days from date. He also gave respondent a new "trust receipt," and a new chattel mortgage and bill of sale on the automobile. (R. 4.) All these documents were executed as part of the same transaction and attached together. (R. 7.) The respondent, having advanced the greater part of the purchase price

of the automobile under this arrangement, simply acquired a lien upon the property for the purpose of securing payment of the note. The Court will examine the whole transaction to ascertain what was the actual intention of the parties, and applying that test, it is clear that the parties intended for petitioner to retain title and for respondent to have a lien upon the property to secure the payment of the loan. Title was acquired by petitioner direct from the wholesale distributor, and there never was any transfer of title to respondent. Nor will the law presume the passage of title for security purposes.

If title was not in petitioner, then petitioner could not have passed title to his purchaser, and the remedy of respondent would have been in replevin against that purchaser. By the respondent's acceptance of the chattel mortgage from the petitioner, it was estopped from disputing petitioner's title to the property.

Maxcy-Barton Organ Co. v. *Glen Corp.*, 355 Ill. 228.

Trustees of Schools v. *Wilson*, 215 Ill. 352.

Jeffery v. *Robbins*, 167 Ill. 375.

The Illinois law is, that where a conditional sales vendor accepts a chattel mortgage on the same property as that covered by the conditional sales contract, the chattel mortgage extinguishes the conditional sales contract, and the vendee's title thereby becomes absolute, subject only to the chattel mortgage lien.

Maxcy-Barton Organ Co. v. *Glen Corp.*, 355 Ill. 228.

This is also the general rule.

Premier & Potter Printing Press Co. v. *Fuller* (C. C. A. 2), 294 Fed. 451.

Nordone v. *Austin Drainage Excavator Co.*, 185 N. Y. S. (App. Div.) 309.

Buckeye Cotton Oil Co. v. *Westerfield*, 186 Ark. 505.

The same rule obtains where the conditional sales contract and chattel mortgage are executed by the purchaser as part of the same transaction. The presumption is that both instruments were intended as a chattel mortgage.

International Harvester Co. v. *Threlkeld*, 226 Mo. App. 600.

Altman & Co. v. *Silha*, 85 Wis. 359.

In Illinois a bill of sale given as security for the payment of a debt does not pass title; the instrument is in effect a chattel mortgage; and the relationship of debtor and creditor is created.

Whittemore v. *Fisher*, 132 Ill. 243.

That the respondent regarded title as being vested in petitioner, subject only to its lien, is clearly shown by the respondent's course of action after petitioner sold the automobile. On pages 2 and 3 of its brief in opposition to the petition for writ of certiorari, filed in this Court, respondent states:

> "In disregard of the terms of the contract, * * * petitioner sold respondent's automobile, and *after a number of demands had been made upon him for payment*, which he did not comply with, the petitioner about a month after this sale, filed his voluntary petition in bankruptcy."

Nor was any demand for possession, a necessary element in a replevin suit, ever made. Respondent simply demanded payment of the note, and nothing more—the fulfillment of a contract engagement. Respondent's repeated demands for *payment* of the note show conclusively that it regarded its relationship with petitioner as that of debtor and creditor. "Payment" of an obligation presupposes such relationship. In *Bronson* v. *Rodes*, 74 U. S. 229, 250, this Court said:

> "Payment of money is delivery by the debtor to the creditor of the amount due."

See also:

Porter v. *Monarch*, 17 Idaho 364.

A case that is conclusive on the nature of the relationship created between the petitioner and respondent under the so-called "trust receipt" is *Bloomingdale* v. *Dreher* (C. C. A. 3), 31 F. (2d) 93, 94. There the defendant had been confined to jail for his failure to pay a judgment rendered against him in the state court. The defendant sued out a writ of habeas corpus setting up that the judgment had been discharged in bankruptcy. There were no special findings of fact, but the evidence in the state court proceeding showed that the defendant, an automobile dealer, obtained financial assistance from the plaintiffs, who were engaged in financing the purchase and sale of automobiles, as was the respondent in the case at bar. Under their arrangement, the automobiles were bought for the defendant by the plaintiffs, who paid eighty per cent of the purchase price of each automobile, the defendant paying the remainder. The automobiles would then be delivered to the defendant at his place of business. The defendant, in respect to each automobile, simultaneous with its purchase, gave the plaintiffs a promissory note for the amount advanced by them on account of the purchase price, an assignment of all his right, title and interest in the automobile, and a "trust receipt" setting forth the terms and conditions under which the automobile was possessed by him, as in the case under consideration. The note contained a provision that upon its payment, the corresponding "trust receipt" and the automobile to which that "trust receipt" pertained, were "to be released" to the defendant. The "trust receipt" signed by the defendant, recited that the automobile was the property of the plaintiffs, and was received from them "upon the trust" therein mentioned. The defendant also "agreed" to hold the automobile "in trust" for the plaintiffs, at defendant's place of business, as the plaintiffs' property, with the privilege of selling it only upon the terms approved by the plaintiffs in writing, and in case of sale

to turn the proceeds over to plaintiffs. Defendant further agreed not to remove the automobile from his premises without plaintiffs' consent in writing, and to return the automobile unused and in good condition to plaintiffs upon demand. Upon default in the payment of the note, plaintiffs were at liberty to sell the automobile and apply the proceeds to the note, the defendant agreeing to pay any deficiency. It was also agreed that the making of the note should not divest the payee of title to the automobile or otherwise affect the "trust receipt," and that in case of non-payment of any note, all obligations owing by the defendant to the plaintiffs would become due. Certain of the automobiles thus financed were sold by the defendant without the written consent or knowledge of the plaintiffs, and the proceeds therefrom were not turned over to plaintiffs. Thereafter suit was brought in the state court where a judgment was obtained for the balance due plaintiffs. The defendant was thereupon taken into custody under a writ of *capias ad satisfaciendum.*

It will thus be seen that the facts in this case, in respect to the nature of the transactions, were similar in all respects to the facts in the case at bar. The United States District Court, for the District of New Jersey, granted a writ of habeas corpus on the principle that the judgment was not within Exception (4) of Section 17 of the Bankruptcy Act, and therefore had been discharged in defendant's bankruptcy proceeding.

The plaintiffs thereupon appealed to the Circuit Court of Appeals for the Third Circuit, and that Court, in affirming the decision of the District Court, said:

> "Whether Dreher's (defendant's) debt is one from which his discharge in bankruptcy would or would not be a release is to be determined from the facts when tested by section 17a of the Bankruptcy Act, 11 U. S. C. A. § 35, which, so far as here asserted to be applicable, reads thus: 'A discharge in bankruptcy shall

release a bankrupt from all of his provable debts, except such as * * *. (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting * * * in any fiduciary capacity.' By the decisions of the Supreme Court in *Crawford* v. *Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147, and *Tindle* v. *Birkett*, 205 U. S. 183, 27 S. Ct. 493, 51 L. Ed. 762, it is now definitely settled that the words 'while acting in any fiduciary capacity' limit and qualify each of the words 'fraud,' 'embezzlement,' and 'misappropriation,' as well as the word 'defalcation' It thus becomes clear, we think, that section 17a(4) applies only to debts created by a person who was already a fiduciary when the debt was created. *Upshur* v. *Briscoe*, 138 U. S. 365, 378, 11 S. Ct. 313, 34 L. Ed. 931; *Cronan* v. *Cotting*, 104 Mass, 245, 6 Am. Rep. 232; *Fleitas* v. *Richardson* (No. 2) 147 U. S. 550, 556, 13 S. Ct. 495, 37 L. Ed. 276.

Viewing the facts as a whole, it is obvious that in the case at bar the transaction was one of borrowing and lending money, which created a debt, evidenced by a note, with respect to each car. That debt did not arise out of any fiduciary relations, howsoever comprehensively that term be construed. The borrower's assignment of his right, title, and interest in and to the car and his 'trust receipt' were but security for the debt evidenced by the note. Even if it be assumed that the breach by the borrower of the terms of the 'trust receipt' created an additional remedy for the collection by the lender of the debt due him, it did not create a new debt."

In support of the principle enunciated in the preceding case, see:

Fleitas v. *Richardson*, 147 U. S. 550.

Upshur v. *Briscoe*, 138 U. S. 365.

In re Butts (D. C. N. Y.), 120 Fed. 966.

American Agr. Chem. Co. v. *Berry*, 110 Me. 528.

Goodman v. *Herman*, 172 Mo. 344.

Conclusion.

We believe we have thus demonstrated that the judgment of the Appellate Court of Illinois, First District, was erroneous, and that the said court, by its judgment, denied to petitioner substantial rights, privileges and immunities, which have been extended to him under Section 17 of the Bankruptcy Act.

We therefore submit that the judgment of the said Appellate Court should be reversed.

Respectfully submitted,

Edward A. Zimmerman,
Counsel for Petitioner.

Franklin D. Trueblood,
George A. Edwards,
Of Counsel.

APPENDIX.

Rules of the Appellate Court of Illinois, First District.

Rule 13.

PETITION FOR REHEARING.

Within ten days after a decision is entered of record the party desiring a rehearing shall give notice in writing to the opposite party or his attorney of his intention to make application therefor, and shall within said ten days file with the clerk of this court a party of such notice, with proof of due service thereof and seven printed copies of the petition for a rehearing. Cover color to be light green. Such petition shall state concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon. In no case will any argument be permitted in support of such petition. This rule will be strictly enforced, and any petition in violation thereof will be stricken from the files. If a rehearing be granted, the case will be reconsidered upon the record, abstracts, original briefs, petition and any answer thereto of which seven printed copies shall have been filed with the clerk of the court within ten days after the order granting a rehearing is entered of record.

Rule 22.

CERTIFICATE OF IMPORTANCE.

(1) When the Appellate Court has granted leave to appeal to the Supreme Court on the ground of importance, the clerk of the Appellate Court shall transmit to the clerk

of the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto, and the certificate of importance of the Appellate Court. Applications for leave to appeal on the ground of importance shall be made by printed or typewritten petitions clearly setting forth the grounds relied upon by the party asking the same, and must be presented to the court, if in session, or to a majority of the judges, if in vacation, within twenty days after entry of judgment in the Appellate Court. The Appellate Court may require bond as a condition of granting leave to appeal on the ground of importance.

STATUTES.

Section 203 (2) Chapter 10, Cahill's Revised Statutes of Illinois (1933), (Section 75 of the Illinois Civil Practice Act.)

> "(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: Provided, however, that in ac-

tions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

Section 237 (b) of the Judicial Code (United States Code, Title 28, Section 344 (b)):

("b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

No. 68

JUL 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS SAID PETITION.

WILLIAM S. KLEINMAN,
Attorney for Respondent.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

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R. H. DAVIS, trading as DAVIS MOTOR SALES,
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AETNA ACCEPTANCE COMPANY, a corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court
Of The United States:

We respectfully submit to the Court that neither in the Appellate Court of Illinois, nor in the briefs filed in this Court does the Petitioner deny that he is guilty of the charge of conversion made against him by the Respondent. The Petitioner's position appears to be, in substance, that

the Trial Court having made inconsistent findings as to the extent of his guilt he should have been entirely purged of liability. The Petitioner, however, ignores the fact that the general finding of guilty conforms entirely to the allegations in the count in trover, as well as to the replication filed by this Respondent to the Petitioner's plea in the Trial Court.

The evidence of Respondent's title to the automobile involved in this suit is represented by the three-fold document introduced in evidence as Plaintiff's Exhibit 1 (R. 9), and which is in the nature of a chattel mortgage and note, bill of sale and trust receipt. Whatever criticism may be directed towards the efficacy of such a document it is unquestionably true that what was intended by this instrument, was the ultimate amount of protection which Respondent could possibly obtain while the automobile in question was in the Petitioner's possession.

An examination of this instrument reveals that regardless as to what may be its technical designation, it is nevertheless true that each portion thereof establishes absolute title to the automobile in the Respondent. Petitioner's right to employ this automobile was strictly limited by the terms of this contract, one salient feature of which is the following paragraph:

> "I (we) agree not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of any of said property to any other person except upon written order from said corporation or release from trust, upon payment to said corporation of the amount required by said order, and upon the endorsement on the back of this Trust Receipt by said Corporation of a release from Trust."

In disregard of the terms of the contract, including the above provision, this Petitioner sold Respondent's automo-

bile, and after a number of demands had been made upon him for payment, which he did not comply with, the Petitioner about a month after this sale, filed his voluntary petition in bankruptcy. Testing the Petitioner's conduct in the light of the provisions of this contract, particularly the above quotation, the Petitioner was unquestionably a bailee or trustee of this automobile; his sale thereof without obtaining a release and without accounting for the proceeds was certainly "fraud, embezzlement, misappropriation, or defalcation", while acting in a "fiduciary capacity"; this brings Petitioner squarely within the exceptions to the discharge provision of the Bankruptcy Act. In the bankruptcy schedules, this Respondent is listed as an unsecured creditor in the sum of $50.00, and is likewise listed as a creditor by virtue of this Petitioner's endorsements on four installment notes which total $2,287.20. (R. 14.)

Notwithstanding the Petitioner's present contention of alleged indebtedness by the Respondent to him for certain credit items, a reference to his schedules B3 and B4, which were introduced in evidence by this Respondent, fails to show any indebtedness whatsoever. (R. 24.) Petitioner must doubtless be held to the truth of his sworn schedules.

This proceeding clearly comes within the rule of *McIntyre* v. *Kavanaugh,* 242 U. S. 138. The opinion of the Appellate Court of Illinois is consistent with the Federal Court rule on the proposition that a judgment in trover for conversion of property, under circumstances such as is disclosed by this record, is one for "wilful and malicious injuries", as would bring this case within the exception to the discharge provision of the Bankruptcy Act.

In re Brier, 3 Fed. (2d) 709.

In re Nordlight, 3 F. Supp. 486.

Regardless as to what process of reasoning the Appellate Court employed in arriving at its conclusion, the judgment was proper and fully justified by the record.

We therefore respectfully submit that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

.....

WILLIAM S. KLEINMAN,
Attorney for Respondent.

MOTION OF RESPONDENT TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI FOR WANT OF JURISDICTION.

The Petitioner bases his right to appeal to this Court on the ground that his petition to the Appellate Court of Illinois for a Certificate of Importance to the Supreme Court of Illinois was denied; he therefore alleges that the Appellate Court of Illinois is the highest court of the State in which a decision in this case could be had. This position would doubtless be true if this Petitioner had fully complied with the rules of the Appellate Court of Illinois with respect to the necessary requirements of such a petition for a Certificate of Importance. From the printed record, it does not appear that a copy of his petition for a Certificate of Importance was filed in this Court. Respondent has therefore caused to be prepared and has filed in this Court, with this Reply, a Certified copy of the original petition for a Certificate of Importance, which it asks leave of Court to make a part of this record.

The right to appeal from the Appellate Court to the Supreme Court of Illinois in any judgment in an amount less than $1,500.00, on the ground of importance is governed by Chapter 110, Section 199, Smith-Hurd Illinois Revised Statutes 1933, in the second paragraph of which is the following sentence:

> "* * * In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them, involved a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court

shall certify to the Supreme Court the grounds of granting said appeal. * * *"

We respectfully draw the Court's attention to Rule 22 of the Rules of the Appellate Court of Illinois, First District, which is as follows:

"RULE 22.

CERTIFICATE OF IMPORTANCE.

(1) When the Appellate Court has granted leave to appeal to the Supreme Court on the ground of importance, the clerk of the Appellate Court shall transmit to the clerk of the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto, and the certificate of importance of the Appellate Court. Applications for leave to appeal on the ground of importance shall be made by printed or typewritten petitions clearly setting forth the grounds relied upon by the party asking the same, and must be presented to the court, if in session, or to a majority of the judges, if in vacation, within twenty days after entry of judgment in the Appellate Court. The Appellate Court may require bond as a condition of granting leave to appeal on the ground of importance."

The salient portion of the Petitioner's petition for leave to appeal to the Supreme Court, on the ground of importance, is as follows:

"Your petitioner further respectfully represents, that he is informed and believes, and so states the fact to be, that the matters in issue presented in said cause have never been passed upon or presented before the Supreme Court of this State; that he deems that the issues involved in said cause are of such importance that they be presented to the Supreme Court of this State for its decision."

It is needless to say that Petitioner made no effort to comply with Rule 22 above quoted, which requires that "* * * application for leave to appeal on the ground of importance shall be made by printed or typewritten petitions *clearly setting forth the grounds relied upon by the party asking the same,* * * *." Having violated or disregarded this rule in failing to clearly set forth the grounds upon which he relied, if he had any such grounds, it is quite obvious why the Appellate Court denied his petition. We believe it to be axiomatic that Petitioner's violation or his wilful failure to comply with a definite rule of the Appellate Court of Illinois, should not be the means of permitting him to appeal to this Court. If he had grounds for appealing to the Supreme Court of Illinois, he should have set them out clearly, as the rule provides; not having done so, but having filed a document which is based upon "information and belief" and does not bear the remotest resemblance to a petition for a Certificate of Importance, he should be barred from employing the denial of such a petition as a means of appealing to this Court.

We therefore respectfully move this Honorable Court to strike the petition for a Writ of Certiorari, for want of jurisdiction, and to dismiss said proceeding.

Respectfully submitted,

.....

WILLIAM S. KLEINMAN,
Attorney for Respondent.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 68

R. H. DAVIS, TRADING AS DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

WILLIAM S. KLEINMAN,
Counsel for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

Petitioner was in the automobile sales business in Oak Park, Illinois; respondent was engaged in the finance business in Chicago. During a course of dealings, over a period of two years, the respondent financed the purchase of approximately twenty-eight to thirty-five automobiles for the petitioner (R. 8).

On the purchase of every automobile from the factory, the parties entered into a written agreement of like character as plaintiff's Exhibit 1 (R. 7). This instrument is a combination chattel mortgage and note, bill of sale and trust receipt, the several portions of which were all signed by the petitioner and delivered to the respondent at the time the money for each automobile was paid over to the petitioner. These instruments were not recorded and remained in the possession of respondent until repayment to it by petitioner of the amount of its investment in the respective automobiles, after which the contract would be cancelled and returned to petitioner.

The contract in evidence as Exhibit 1 (R. 7) is dated July 10, 1929, and is a renewal of a like contract executed the previous month. This contract represents an investment of $1,181.87, which sum the respondent paid to the petitioner by a check which is in evidence as Exhibit 2 (R. 7). Petitioner sold the particular automobile described in this contract on August 3, 1929, (R. 8) without the knowledge or consent of respondent. About August 7 or 8, respondent's agent called at petitioner's place of business and discovered that the car had been sold (R. 6), whereupon he made demand upon petitioner for payment of the money due to respondent, as represented by this contract; petitioner replied in effect, that he would send a check as soon as he got around to it (R. 6). The sale of this automobile without respondent's knowledge, having thus been brought to the respondent's attention, and payment of this obligation not having been made for two days after such knowledge was acquired, the respondent immediately thereafter removed from the possession of the petitioner two other automobiles which were then on the show-room floor of petitioner's establishment (R. 7)

under contracts of like character. Within thirty days thereafter, on September 13, 1929, petitioner filed a voluntary petition in bankruptcy (R. 11). In the Bankruptcy Schedules A3 and A4 the respondent is listed as a merchandise creditor to the extent of $50.00, in addition to several items of contingent liability on retail deals which petitioner had endorsed and sold to respondent, with recourse (R. 10). The respondent is not listed in Schedule B3 (R. 17). The petitioner was discharged in bankruptcy on June 9, 1932, whereupon the respondent proceeded with its present action against the petitioner.

The suit as originally filed was in replevin for the recovery of the Auburn Sport Sedan Automobile mentioned in the contract. The car not having been recovered under the Replevin Writ, the respondent declared in trover for the wrongful conversion thereof (R. 1). This change in the form of action is permissible under the Replevin Act of the State of Illinois; the applicable provision is Chapter 119, Sec. 18, Smith-Hurd Illinois Revised Statutes, 1933, which is as follows:

> "When the property or any part thereof has not been found or delivered as aforesaid, and the defendant is summoned or enters his appearance, the plaintiff may declare in trover for such property or so much thereof as is not found and delivered to the Sheriff, Constable, or other officer, and as to the property not found and delivered, the plaintiff, if he shall recover, shall be entitled to judgment for the value thereof or his interest therein, and such damages as he shall have sustained by reason of the wrongful taking and detention, as in other cases of trover."

To the Count in Trover, the petitioner filed two pleas; the first was of the general issue (R. 1), and the second was a special plea alleging the petitioner's adjudica-

tion and subsequent discharge in bankruptcy (R. 2). To the special plea this respondent filed a replication in which it set out the terms of its contract, the wrongful breach thereof and averred that the conduct of the petitioner was such as would place this cause of action within the class of non-dischargeable claims, under Clause 2 and 4 of Sec. 17, of the Bankruptcy Act.

At the conclusion of the trial, and at the request of the petitioner, the Court made a special finding that this petitioner was not actuated by wilful, malicious or criminal intent in disposing of the car in question (R. 3). At the request of this respondent the Court, by a special finding, found the petitioner guilty of legal conversion of the property as described in the Count in Trover (R. 3). By its general finding and judgment, the Court found this petitioner guilty of converting the property of the respondent as charged in the Count in Trover, and assessed the damages at the sum of One Thousand Dollars ($1,000.00) (R. 21).

On appeal to the Appellate Court for the First District of Illinois, that Court after fully reviewing the case said (R. 33):

> "It is apparent from the various agreements made between the parties that the Plaintiff retained all title, dominion, and control over this [illegible] without plaintiff's consent, and that he was guilty of wrongful conversion when he did so."

The Appellate Court likewise held that this respondent's claim against petitioner was not affected by the discharge in Bankruptcy, and affirmed the judgment (R. 33).

SUMMARY OF ARGUMENT.

I.

A claim which is exempt from a discharge in bankruptcy under either of the Clauses of Section 17 of the Bankruptcy Act, may nevertheless be provable without effecting its status as a non-dischargeable claim.

II.

The special findings, insofar as they may be found to be inconsistent to each other, may be entirely disregarded, in which event, the general findings and judgment will control, as sustaining this cause of action. However, giving the special findings their full weight, would not affect the propriety of this judgment, as the Appellate Court of Illinois held that the petitioner's conduct in disposing of the respondent's property, was wrongful.

III.

(a) The sale of the automobile by petitioner in total disregard of respondent's rights under the bailment contract was a wilful and malicious injury to the property of respondent under Clause 2, Sec. 17 of the Bankruptcy Act.

(b) Proof of wrongful intent is not necessary, if the act is wrongful.

IV.

By their contract, the parties created a fiduciary relationship; a breach thereof by petitioner, resulting in injury to this respondent, comes within the exception under Clause 4, Sec. 17 of the Bankruptcy Act.

ARGUMENT.

I.

The contention of petitioner that this claim was provable in bankruptcy has no bearing upon this controversy. A claim which is provable may nevertheless be non-dischargeable. Authority for this rule appears *In re Stark,* 50 Fed. (2nd) 260, where the Court says on page 262:

> "The question whether a claim is provable, however, does not determine whether it is dischargeable, for a defrauded creditor may get on account, what he can in the bankruptcy proceeding by dividends or payment on composition without having barred by the discharge of his debtor any deficiency balance due on his non-dischargeable cause of action for fraud." (Citing *Friend* v. *Talcott,* 228 U. S. 27)

In the present case, the respondent did not file a claim in the bankruptcy proceeding, and received no dividend; it pursued its remedy in trover, after the petitioner's discharge.

The argument on page 10 of petitioner's brief that "The election of respondent to sue petitioner in tort instead of in contract did not change the character of the claim so as to make it not provable in bankruptcy", is inapplicable to the case at bar, as that rule was announced in *Crawford* v. *Burke,* 195 U. S. 176, prior to the amendment of the Bankruptcy Act in 1903. Consequently, the rule no longer prevails. Authority for this statement is found *In re Franks,* 49 Fed. (2nd) 389, which was a case where a judgment in trespass for conversion of an automobile had been obtained against the bankrupt. There was no element of malice

alleged in the pleadings, or mentioned in the judgment. The District Court vacated the order it previously entered restraining the enforcement of the judgment, and said on page 390:

> "Counsel for the bankrupt in support of his contention that the judgment was a provable debt has cited *Crawford* v. *Burke,* 195 U. S. 176 and *Tindle* v. *Birkett,* 205 U. S. 183, and contends that those cases are authority for the proposition that where a plaintiff may waive a tort and sue upon an open account or implied contract, his judgment no matter whether obtained in an action for the tort, or upon the contract or open account, is a provable debt. Both of these cases were based upon Sec. 17 of the Bankruptcy Act prior to its amendment by the Act of February 5, 1903 (32 Stat. 798)."

II.

Counsel for petitioner, in his brief, has argued at great length on the proposition that the Trial Court having made a special finding, at petitioner's request, to the effect that petitioner had not been actuated by a wilful, malicious or criminal intent in disposing of the automobile in question, the conversion was merely technical, and therefore dischargeable. There can be no force to this argument for it ignores entirely the special finding made by the Court at the request of the respondent, "finding the defendant guilty of conversion of the property of the plaintiff as described in the Count in Trover" (R. 3). The Count in Trover charges that the petitioner "wilfully, wrongfully, tortiously and maliciously converted" (R. 1) the automobile which was the subject matter of the suit. Whatever contradiction may appear or exist as the result of the two special findings, is cured by the following lan-

guage of the Court's general finding and judgment (R. 21):

> "Court heard all the evidence adduced and being fully advised in the premises finds the defendant guilty of converting the property of the plaintiff as charged in plaintiff's count in trover heretofore filed herein."

Nor does counsel for the petitioner take cognizance of the fact that the Count in Trover also charges the conversion to have been wrongful and tortious, which was not negatived by either special finding. It is likewise significant that the petitioner entirely ignores the effect of the judgment of the Appellate Court from which we have quoted on page 4, above, and which definitely holds that the conduct of the petitioner in disposing of the automobile of the respondent was improper, and that "he was guilty of wrongful conversion when he did so." This fully conforms to the requirement of the Illinois Statute above quoted. The importance of the elements we have outlined should not have been ignored by the petitioner; a proper presentation of the issues, should have impelled counsel to draw these facts to the attention of this Court.

III (a).

It is obvious that it was the intention of the parties that the respondent should be given the greatest amount of security possible in the protection of its interest in this property against default or misuse thereof by this petitioner. For this reason a composite of a chattel mortgage, trust receipt, and bill of sale was used to create an enforceable contract between the parties. It is to be borne in mind, however, that this instrument was not recorded, and as respects an inno-

cent purchaser of the automobile, it was a secret lien, and unenforceable; although it was enforceable between the immediate parties. In this respect we desire to call the Court's attention to Chapter 121½, Sec. 23, Smith-Hurd, Illinois Revised Statutes, 1933, Page 2559, which provides:

> "Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In construing this section of the Statute, the Appellate Court of Illinois, in the case of *Dayton Scale Company* v. *General Market House Company,* 248 Ill. App. 279, (following the language of the Illinois Supreme Court, in the case of *Drain* v. *LaGrange State Bank,* 303 Ill. 330), said on page 283:

> "If a vendor of a chattel delivers it to a vendee or allows him to have possession of the chattel before payment of the purchase price and to have all the *indicia* of ownership, retaining, however, a secret lien for payment, * * * An innocent purchaser will be protected, without regard to the terms of the contract of sale, where the appearance of ownership is in one while the title is really in another, or there is a secret lien."

The following cases reaffirm this rule:

Gilbert v. *National Cash Register Co.,* 176 Ill. 288.

National Bond & Investment Company v. *Shirra,* 255 Ill. App. 415.

Gordon Motor Finance Co. v. *Aetna Acceptance Co.,* 261 Ill. App. 536.

Since the opinion by this Court in *McIntyre* v. *Kavanaugh,* 242 U. S. 138, it is now a definitely settled rule of law, that a claim or judgment for a wrongful conversion of personal property is exempt from the operation of a discharge in bankruptcy. This court said on page 141:

> "To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dictionary—Injury. And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute it would rather tend to bring about unfortunate if not irrational results. Why, for example, should a bankrupt who had stolen a watch escape payment of damages but remain obligated for one maliciously broken? To excuse from discharge the liability arising from such transactions as those involved in *Crawford* v. *Burke,* 195 U. S. 176, and here presented, not improbably was a special purpose of the amendment."

(b).

Counsel for petitioner has gone to considerable length in his argument, to attempt to show that proof of malice or wrongful intent, is a necessary element to exempt a judgment in trover for conversion from a discharge in bankruptcy; in support of this position, counsel cited a number of cases which were actions for fraud and deceit, and for obtaining prop-

erty by false representations. Obviously, in the class of cases mentioned, *scienter* is a primary element, which must be alleged and proved to justify a recovery. The *scienter* forms no part of a trover action for conversion. It is the wrongful act, rather than the intent which establishes this cause of action. The Appellate Court of Illinois, in its opinion in this case restated the rule announced in *Campau* v. *Bemis,* 35 Ill. App. 37, and said (R. 33):

> "A wrongful intent is not an essential element of the conversion. It is enough in this action, that the rightful owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it."

A number of decisions of the Federal Courts rendered prior and since the amendment of 1903 are reviewed *In re Kalk,* 270 Fed. 627, the Court on page 631 said:

> "But while, to establish malice for certain purposes, such willful intent is not necessary, that intent is not involved in the legal definition of the term 'malice.' Whenever the act is done intentionally, without just cause or excuse, a legal inference of malice arises therefrom."

In re Stenger, 283 Fed. 419, presents an applicable rule. The action was for conversion, but did not charge the bankrupt with wilful or malicious conduct. However, the Court on page 420 said:

> "It is well settled that, in order to come within the 'wilful and malicious injuries' here mentioned, it is not necessary that an injury should involve special or actual malice, but, in the language of the United States Supreme Court in *Tinker* v. *Colwell,* 193 U. S. 473, 'a wilful disregard of what one knows to be his duty, an act which is against good morals and wrongful of itself, and which necessarily causes injury and is

done intentionally, may be said to be done wilfully and maliciously so as to come within the exception' ".

Nowhere does the petitioner contend that he did not intentionally sell this automobile nor does he contend that he did not appropriate the entire proceeds thereof.

The trust receipt portion of this contract has the following provision:

> "I (we) agree not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of any of said property to any other person except upon written order from said corporation or release from trust, upon payment to said corporation of the amount required by said order, and upon the endorsement on the back of this Trust Receipt by said Corporation of a release from Trust."

There are several other provisions in this contract, of like importance, which the petitioner breached by the unauthorized and wrongful sale of this automobile. In view of petitioner's knowledge of the contents of this form of contract, having executed between twenty-eight and thirty-five during his course of dealings with the respondent, his conduct is all the more culpable.

A state of facts analogous to the case at bar was presented *In re Brier,* 3 Fed. (2nd) 709, where the Court in vacating an order entered by the Referee, restraining the enforcement of a claim for conversion, against the bankrupt said:

> "The Far Rockaway Securities Company, Inc., seeks to vacate an order heretofore granted staying that company from prosecuting a suit against the bankrupt upon the ground that, as the suit is in conversion, the claim is not dischargeable. The complaint alleges that a corporation known as Brier Bros., Inc., sold motor vehicles, by instruments in writing to the Far Rockaway Securities Company, the petitioner herein, that these motor

vehicles were left in the possession of the corporation by the Far Rockaway Securities Company, and that defendants (Brier Bros., Inc., Herman Brier, and John M. Brier, individually and as officers of Brier Bros., Inc.) converted the motor vehicles and converted and appropriated the proceeds of sale of said vehicles."

Proceeding further, the court says:

"Under section 17 of the Bankruptcy Act * * * a bankrupt may have a discharge in bankruptcy from all his provable debts, except those which * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another. The claim is made that the nature of the conversion alleged in the complaint is such as to bring the matter within the charge of 'willful and malicious injuries' to personal property.

Whatever confusion existed in reference to the meaning of this clause has been settled by the United States Supreme Court in *McIntyre* v. *Kavanaugh,* 242 U. S. 138, 37 St. Ct. 38, 61 L. Ed. 205. In that case a broker who had sold corporate stocks in excess of the debt for which they had been pledged, as security, and had appropriated the proceeds of sale, without the knowledge or consent of the owner of the stocks, was held to have caused 'willful and malicious injury to the property', within the meaning of clause 2, section 17. * * *"

To the same effect are the decisions in the following cases:

In re Nordlight, 3 Fed. Supp. 486.
In re Franks, 49 Fed. (2nd) 389.
Baker v. *Bryant Fertilizer Co.,* 271 Fed. 473.
In re Stenger, 283 Fed. 419.
In re Keeler, 243 Fed. 770.
Citizens Bank v. *Mullis,* 161 Ga. 371;
Strickland v. *Household Finance Corp.,* 172 Ga. 279.

Probst v. *Jones,* 247 N. W. (Mich.) 779.
South Atlantic Guano Co. v. *Childs,* 101 So. Rep. (Ala.) 445.

IV.

There can be no doubt from an interpretation of the contract between the parties, that it was their intention to create, and they did in fact create a fiduciary relationship. As we have previously pointed out, the unrecorded contract placed this instrument within the category of a secret lien, which was unenforceable against an innocent purchaser for value. It was known to the parties that a sale of this automobile would give the respondent no recourse for the recovery thereof, against an innocent purchaser. It was therefore logical that they should by their written agreement create a relationship which would be indefensible, in the event of a breach by the petitioner. The only logical inference which can be drawn from the use by the parties of a composite of several independent agreements, blended into one contract, is that this respondent sought by its contract to obtain the highest standard of security possible under the circumstances. Under one portion of this contract, this petitioner consented to be bailee of this automobile, while under another portion thereof he became the trustee of this automobile for the benefit of this respondent; in all three portions of the contract he acknowledged this respondent to be the sole and lawful owner of the automobile, and agreed to make no use thereof, except as strictly limited by the contract. To say that the provisions of this agreement do not have the meaning or effect thereby explicitly intended, would be to completely nullify it.

This Court should not be asked to nullify, modify, or remake this contract, merely because the petitioner now finds that bankruptcy will not relieve him from a wrongful breach thereof.

In support of the petitioner's contention that this contract did not create a fiduciary relationship between him and the respondent, and to impress this Court to that effect, counsel for petitioner devoted three pages of their brief to a recital of the case of *Bloomingsdale* v. *Dreher,* 31 F. (2nd) 93. There are many salient features embodied in the contract between the parties to this proceeding, such as the chattel mortgage and bill of sale, which do not appear, and could therefore not have been considered in the case cited. Regardless of this fact, however, the action in that case, was on the debt, evidenced by the contract, and not for damages for the wrongful breach of the contract. The last sentence of the Court's opinion in that case (which counsel did not quote), completely dismisses counsel's argument as to the relevancy of that case, to the case at bar, for the Court said on page 95, in closing:

> "Moreover, the complaint upon which the judgment in the State Court was had sets up the original debt, not a new one arising out of the breach of the trust agreement."

Conclusion.

We respectfully submit that the record is free from the errors urged by the petitioner. The judgment of the Appellate Court for the First District of Illinois is right, is fully sustained by the law, and should be affirmed.

Respectfully submitted,

William S. Kleinman,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 68.—October Term, 1934.

R. H. Davis, Trading as Davis Motor Sales, Petitioner,
vs.
Aetna Acceptance Company, a Corporation, Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, First District.

[December 3, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

A discharge in bankruptcy, pleaded as a defense to a declaration in trover for the conversion of a chattel, has been ruled by the courts below not to constitute a bar. The question is whether upon the evidence and the findings the bar should have been upheld.

The petitioner was a dealer in automobiles, selling them at retail and maintaining a salesroom where his wares were displayed. To put himself in funds for the acquisition of the cars he obtained loans from the respondent, the Aetna Acceptance Company, in thirty-five or more transactions. In particular he borrowed $1,181.87 on July 10, 1929, procuring title thereby to an Auburn sedan. This was 90% of the cost of the car, the residue of the price being paid out of his own money. At once upon receipt of the sedan, he delivered to the respondent a set of four papers: a promissory note for $1,181.87 to the order of the respondent payable in sixty days; a chattel mortgage covering the automobile and securing payment of the note; a trust receipt, acknowledging receipt of the automobile, and agreeing to hold it as the property of the respondent for the purpose of storage, and not to sell, pledge or otherwise dispose of it except upon consent in writing; and finally a bill of sale, absolute in form.

On August 3, 1929, the automobile, then on exhibit in the petitioner's showroom, was sold by one of his salesmen, and thereupon or soon afterwards petitioner received the price. There is a stipulation that the sale was made without concealment and in the ordi-

nary course of business, though without written consent. According to the petitioner's testimony, notice of the transaction was given the same day to one of the respondent's officers. There is also testimony tending to support the inference that on many other occasions cars held upon like terms had been sold without express consent and the proceeds accounted for thereafter. On this occasion the petitioner promised to make prompt remittance of a check, subject to an offset or credit growing out of other dealings. He did not keep his promise. Instead, he filed a petition in bankruptcy on September 13, 1929, obtaining later his discharge after duly listing the respondent in his schedule of creditors. The filing of that petition was followed by this action for conversion. The trial judge, overruling the special plea of a discharge, gave judgment in favor of the respondent for damages and costs. The Illinois Appellate Court affirmed. There was a refusal of leave to appeal to the Supreme Court of the State, permission being requisite because of the amount involved. The case is here on certiorari.

The effect of a discharge in bankruptcy is to "release a bankrupt from all of his provable debts," with excepted liabilities enumerated in the statute. Bankruptcy Act, § 17; 11 U. S. C. § 35. There is no dispute that the respondent had a provable debt. It might have proved upon the note, "a fixed liability as evidenced by . . . an instrument in writing." Bankruptcy Act, § 63 (1); 11 U. S. C. § 103a. If its grievance was the sale, it might have proved "upon a contract, express or implied" (§ 63 [4]), waiving the tort and standing upon the implied assumpsit. *Crawford* v. *Burke,* 195 U. S. 176, 193; *Tindle* v. *Birkett,* 205 U. S. 183. What it did is not decisive. *Crawford* v. *Burke, supra; Tindle* v. *Birkett, supra.* Enough that a method of proof had been provided to be used at its election.

The debt being provable, the next inquiry must be whether the liability back of it is within one of the excepted classes. For present purposes, only two of the exceptions (§ 17 [2] and [4]) will have to be considered. The others by concession have no relation to this case. Subdivision 2 excludes from the release "liabilities for . . . willful and malicious injuries to the person or property of another." Subdivision 4 excludes the liabilities of a bankrupt "created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

1. The respondent contends that the petitioner was liable for a wilful and malicious injury to the property of another as the result of the sale and conversion of the car in his possession. There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre* v. *Kavanaugh,* 242 U. S. 138, where the wrong was unexcused and wanton. But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice. *Boyce* v. *Brockway,* 31 N. Y. 490, 493; *Laverty* v. *Snethen,* 68 N. Y. 522, 527; *Wood* v. *Fisk,* 215 N. Y. 233, 239; *Stanley* v. *Gaylord,* 1 Cush. (Mass.) 536, 550; *Compau* v. *Bemis,* 35 Ill. App. 37; *In re De Lauro,* 1 F. Supp. 678, 679. There may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one. Turning to the findings here, we see that wilfulness and malice have been unmistakably excluded. Cf. *In re Dixon,* 21 F. (2d) 565, 566; *In re Burchfield,* 31 F. (2d) 118, 119. The trial court made a special finding as follows: "The court finds that the defendant in this case was not actuated by wilful, malicious or criminal intent in disposing of the car in question." In these circumstances the respondent is not helped by the later and general finding that the petitioner was "guilty of legal conversion of the property, as described in the count in trover." The special controls the general, just as upon the verdict of a jury. *Walker* v. *New Mexico & S. P. R. Co.,* 165 U. S. 593, 598; *Victor Am. Fuel Co.* v. *Peccarich,* 209 Fed. 568, 571.

Nothing in the judgment of the Illinois Appellate Court is at war with the exculpatory finding made upon the trial. The Appellate Court repeats the words of the trial judge without hint of disapproval. Its only comment is that under the law of Illinois malice and wrongful intent are not necessary constituents of a cause of action in trover. This, of course, is true, but though true, it is beside the mark. The discharge will prevail as against a showing of conversion without aggravated features.

2. The respondent contends that irrespective of wilfulness or malice, the petitioner is within the exception declared by subdivi-

sion 4, his liability arising, it is said, from his fraud or misappropriation while acting in a fiduciary capacity. The meaning of these words has been fixed by judicial construction for very nearly a century. *Chapman* v. *Forsyth,* 2 How. 202, decided in 1844, is a decision to the effect that within the meaning of a like provision in the Act of 1841, a factor does not act in a fiduciary capacity; the statute "speaks of technical trusts, and not those which the law implies from the contract." 2 How. at p. 208. The scope of the exception was to be limited accordingly. Through the intervening years that precept has been applied by this court in varied situations with unbroken continuity. *Neal* v. *Clark,* 95 U. S. 704; *Hennequin* v. *Clews,* 111 U. S. 676, 682; *Noble* v. *Hammond,* 129 U. S. 65, 68; *Upshur* v. *Briscoe,* 138 U. S. 365; *Crawford* v. *Burke, supra; Tindle* v. *Birkett, supra.* Cf. *Cronan* v. *Cotting,* 104 Mass. 245; *Clair* v. *Colmes,* 245 Mass. 281. It is not enough that by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio.* He must have been a trustee before the wrong and without reference thereto. In the words of Blatchford, J., "The language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created." *Upshur* v. *Briscoe, supra,* at p. 378. Was petitioner a trustee in that strict and narrow sense? We think plainly he was not, though multiplicity of documents may obscure his relation if the probe is superficial. The only writing at all suggestive of a trust is the one that is characterized as a trust receipt. What effect would be given to it if it stood alone there is no occasion to consider. It does not stand alone, but is a member of a group which must be read with a collective meaning. The note, the chattel mortgage, the trust receipt and the bill of sale were made at the same time. We must view them all together. Clearly the respondent's only interest in the car was as security for the debt; this is the central fact, the coordinating element, that unifies the whole transaction. The bill of sale may seem to make the creditor a purchaser; whatever its recitals, it is a mortgage in another form. *Whittemore* v. *Fisher,* 132 Ill. 243. The trust receipt may state that the debtor holds the car as the property of the creditor; in truth it is his own property, subject to a lien. *Barchard* v. *Kohn,* 157 Ill. 579, 585, 586. The substance of the transaction is this, and nothing more, that the mortgagor, a

debtor, has bound himself by covenant not to sell the mortgaged chattel without the mortgagee's approval. The resulting obligation is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust. Cf. *In re Butts*, 120 Fed. 966, 971; *Bloomingdale* v. *Dreher*, 31 F. (2d) 93. The relation would be no different if the duty had been stated in terms of covenant alone without descriptive epithet. A mortgagor in possession before condition broken is not a trustee for the mortgagee within the meaning of this statute, though he has charged himself with a duty to keep the security intact. Cf. *Ten Eyck* v. *Craig*, 62 N. Y. 406, 422.

No question as to a cause of action arising from a conversion of the proceeds of the sale with wilfulness and malice as distinguished from one arising from the conversion of the car itself is before us on this record.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.